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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 90-130

LUCKENBACH STEAMSHIP COMPANY, INC.,
Plaintiff,

against

THE UNITED STATES OF AMERICA, ET AL.,
Defendants

STATEMENT AS TO JURISDICTION

I

Introductory

Plaintiff Luckenbach Steamship Company, Inc. ("Luckenbach"), in compliance with Rule 12 of the Supreme Court of the United States, submits herewith a statement particularly disclosing the statutory and substantial basis of the jurisdiction of the Supreme Court to review on appeal the judgment entered by the district court in this case.

A. *Opinion Below*

The opinion of the three-judge United States District Court for the Southern District of New York is not yet officially reported. A copy is attached hereto as Appendix A. The report of the Interstate Commerce Commission ("Commission"), *Isbrandtsen Co., Inc., Common Carrier*

Application, 285 I. C. C. 369, is attached hereto as Appendix B.

B. *Statutory Provisions Believed to Sustain Jurisdiction*

Final judgment denying interlocutory and permanent injunctions, and dismissing the complaint, was entered January 29, 1954, by a district court specifically convened pursuant to 28 U. S. C. §§ 2325 and 2284. Jurisdiction of the Supreme Court to review the judgment herein by direct appeal is conferred by 28 U. S. C. § 1253.

C. *Questions Presented*

The report of the Interstate Commerce Commission appears reasonable and intelligible on its face. It is not Luckenbach's position that the Commission failed to make findings of fact or that it failed to give rational reasons for its action. Rationality, however, was achieved by completely disregarding concededly material issues under the National Transportation Policy of the Interstate Commerce Act that represented Luckenbach's entire affirmative case on the administrative record. Indeed, one of those issues the Commission itself discussed in a similar case decided one day earlier, and resolved in favor of Luckenbach. Under these circumstances, the specific questions presented are:

1. Whether the report of an administrative agency, which is reasonable on its face but which ignores altogether material issues constituting the entire case of the principal protesting party, complies with the requirement of Section 8(b) of the Administrative Procedure Act that the agency shall give its "reasons or basis . . . upon all the material issues of fact, law, or discretion presented on the record."

2. Whether the Commission complied with the Interstate Commerce Act and Section 8(b) of the Administrative Procedure Act in excluding evidence of rate-cutting prac-

tices by an applicant for a certificate of public convenience and necessity relevant to the issue of unfair competitive practices under the National Transportation Policy of the Interstate Commerce Act, and refusing to give its reasons for excluding such evidence.

3. Whether it is abitrary and capricious action by the Interstate Commerce Commission:

Where, in *West Coast Trans-Oceanic S. S. Line Com. Car. Application,* 285 I. C. C. 381, a similar case, decided one day before this one, the Commission decided, in direct conflict with its decision in this case, (a) that a determination as to whether additional intercoastal service would impair or endanger existing operations "must be made" and could not be; (b) that the alleged need for eastbound service from most Northwest ports was only temporary; (c) that service eastbound from San Francisco was adequate and did not require additional service; and (d) that the fact that a port which did not have direct intercoastal service but had to ship through nearby larger ports was insufficient justification for finding a need for direct local service.

4. The other questions raised by the assignment of errors.

D. *Statutes Involved*

The provisions of the National Transportation Policy of the Interstate Commerce Act, 54 Stat. 899, 49 U. S. C. A. preceding §§ 1, 301, 901 and 1001, and the relevant provisions of Section 8(b) of the Administrative Procedure Act, 5 U. S. C. § 1007(b), are set forth below in the text demonstrating that the questions are substantial.

E. *History of the Case*

Isbrandtsen Co., Inc. ("Isbrandtsen"), applied to the Interstate Commerce Commission for a certificate of public convenience and necessity as a common carrier by water in

a one-way operation from Pacific Coast ports to North Atlantic ports by way of the Panama Canal. A portion of Isbrandtsen's proposed operation would constitute a California/North Atlantic segment of a fortnightly eastbound around-the-world steamship service. Luckenbach is a certificated water carrier operating exclusively in the intercoastal trade in both directions between the Atlantic and Pacific Coasts. Luckenbach protested the application, participated in hearings before the Commission in New York, San Francisco, and Washington, D. C., and presented a brief, exceptions, a reply, oral argument, and a petition for reconsideration.

By a report and order dated September 10, 1953, Division 4 of the Commission, one commissioner dissenting, granted the certificate on the terms set forth in the opinion of the court below. On petition for reconsideration, the full Commission affirmed the report and order of Division 4, without opinion, four commissioners dissenting. Thereafter Luckenbach instituted this action in the District Court for the Southern District of New York to enjoin or set aside both the original order of Division 4 and the order denying the petition for reconsideration. On January 22, 1954, the district court rendered an opinion dismissing the complaint and dissolving the stay. Final judgment was entered January 29, 1954.

II

The Questions Are Substantial

1. This case raises a substantial question as to whether an administrative agency complies with the requirements of Section 8(b) of the Administrative Procedure Act when the explanation for its action is reasonable only because it puts aside and ignores the difficult and concededly material issues urged by the losing party. The Supreme Court

has never passed on the question whether, in the light of Section 8(b), an agency's report may lawfully disregard the material issues comprising the entire affirmative case of the principal protesting party in a proceeding. Indeed, the main objective of Section 8(b) in requiring an agency to give its reasons is to remove from administrative procedures the sharp sense of injustice arising from a failure to answer serious and difficult questions put in issue by the losing party.

2. Additionally, the district courts are sharply divided on the extent to which the Interstate Commerce Commission is, in any event, required to give its reasons for disposing of material issues raised under the National Transportation Policy of the Interstate Commerce Act. In *Cantlay & Tanzola* v. *United States*, 115 F. Supp. 72, 81 (U. S. D. C. S. D. C. 1953), and in *Clarke* v. *United States*, 101 F. Supp. 587, 593-94 (U. S. D. C. D. C. 1951), the district courts for the Southern District of California and for the District of Columbia held that the Interstate Commerce Commission must articulate its reasoning on the relevant and material issues raised by the parties under the National Transportation Policy.[1] Conflicting with these decisions is that of

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[1] "There is support in principle for the view that reports of the Commission should affirmatively disclose some indication that relevant factors of the National Transportation Policy have been considered. We express no opinion as to that, but we hold that minimum recognition of the National Transportation Policy requires an affirmative declaration by the Commission with respect to a factor so vitally affecting the public interest as does national defense. Cf. State of North Carolina v. United States, 1945, 325 U. S. 507, 515, 520, 65 S. Ct. 1260, 89 L. Ed. 1760." Cantlay & Tanzola v. United States, 115 F. Supp. 72, 81.

With respect to the Clarke case, discussion of adequate expression by the Commission of its consideration of facts bearing on injury to existing carriers under the National Transportation Policy is contained in the court's opinion at pages 593-94, especially in the following paragraph:

> "Reference was made hereinabove to a clause in a sentence in the second report of Division 5 upon reconsideration to the effect that the grant of Greyhound's application would 'place the competitive situation

the court below, holding that if the Commission gives a rational explanation for the basis of its decision the court will infer that the Commission had a sufficient basis for disposing of undiscussed issues under the National Transportation Policy. The court below said it would not send the case back to the Commission for what it termed "more explicit and seemingly useless discussion." Such discussion, however, as will be hereafter shown, would not be useless; it would necessarily raise and resolve important issues of law now buried from the parties and the courts by the Commission's failure to refer to them. Indeed, the very seriousness of the issues may have motivated the Commission's silence.

This case, then, presents a conflict among the statutory district courts on a matter of vital importance affecting the Commission's administration of the Interstate Commerce Act, and raises a broad general question, which has never heretofore been definitively decided, as to the impact of the Administrative Procedure Act on material issues raised in any administrative proceeding.

A. *Appellant's Case Before the Interstate Commerce Commission and the Disposition Thereof*

Before the full significance of the questions raised on this appeal can be conveyed, it is first necessary to set forth briefly the elements of the leading issues raised before the Commission. In addition to denying any need for more intercoastal service, Luckenbach raised and vigorously

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on a more normal and sound basis.' The quoted statement is too cryptic to satisfy us that the Commission meant by it to find that there would be no adverse effects upon Atwood should the application be granted to Greyhound. Moreover, the expression comes at the end of a long discussion of the situation entirely from Greyhound's viewpoint, and in its context seems to refer to the effect of the application upon Greyhound rather than to possible effects upon Atwood." Clarke v. United States, 101 F. Supp. 587, 593-94.

pressed three affirmative issues on the administrative record under the National Transportation Policy:

First, it asserted that certification of Isbrandtsen would create an unprecedented opportunity for unfair competition arising out of the intermingling of regulated intercoastal service with unregulated foreign-trade services. In support of its position on this issue, Luckenbach proffered, but was not permitted to introduce, evidence as to Isbrandtsen's rate-cutting practices;

Second, Luckenbach urged that in consequence of the marginal results of the existing carriers' operations, the further dilution of traffic, which the Commission found would occur, would seriously endanger or impair their continued operation;

Third, Luckenbach asked the Commission to consider the special contribution to the national defense of its exclusively intercoastal service, in that such a service retained ocean-going vessels in nearby friendly waters, readily available for emergency service, whereas Isbrandtsen's proposed intercoastal service, to be operated as a short segment of a long-haul round-the-world service, would deploy the vessels throughout the world, making them largely unavailable for emergency military purposes.

As a reading of its report (Appendix B hereto) demonstrates, none of the three issues raised under the Policy by Luckenbach was discussed, considered or referred to by the Commission. The National Transportation Policy is not mentioned in the report, and no language from the Policy is quoted, discussed, or otherwise adverted to. No one could surmise from the report that the issue of unfair and destructive competitive practices was the sharpest legal issue in the entire proceeding, or that evidence on this point was proffered and excluded over vigorous objection.

B. *The Opinion of the Court Below*

The district court concedes, and we hereafter demonstrate, that the issues raised by Luckenbach under the National Transportation Policy are relevant and material. The gist of the court's opinion is that it is compliance with Section 8(b) of the Administrative Procedure Act if the Commission's report makes sense on its face and the court can infer from the statement of facts in the report, in conjunction with the ultimate conclusion, that the Commission "considered" the issues raised. The district court's opinion can best be analyzed by treating each issue separately.

1. *The issue of unfair competitive practices*

The court below inferred that the Commission sufficiently disposed of the issue of unfair competition (a) because its report notes that Isbrandtsen is at present engaged exclusively in unregulated foreign trade and that the proposed service would be carried out as a part of a round-the-world route; (b) because Isbrandtsen's certificate contained cargo, port coverage and seasonal restrictions; and (c) because other certificated carriers intermingle unregulated foreign with regulated domestic service. None of the three grounds was relied on by the Commission to resolve the issue of unfair competition, which was not mentioned in its report.

First, while the Commission's report describes Isbrandtsen's foreign trade services, those facts were relevant to Isbrandtsen's ability to operate steamships, to financial fitness, and to the geographical scope and schedule of the proposed operation—all of which were determinations which had to be made before the Commission could issue a certificate. Isbrandtsen's foreign-trade services were not characterized by the Commission as "unregulated," and

there is no indication whatsoever in the report that those services bore any relevance to the issue of unfair competition or the National Transportation Policy.

Second, the court misapprehended the cargo, port coverage and seasonal restrictions imposed by the Commission in the Isbrandtsen certificate. Isbrandtsen received the right to serve all the ports it sought to serve. The seasonal and cargo limitations [2] are stated by the Commission to result from the nature of the alleged need at particular ports for particular types of cargo. The Commission did not relate the restrictions to the issue of unfair competition. Moreover, the district court entirely misconstrued the impact of Luckenbach's position. Unfair competitive practices are not made lawful by being limited to certain seasons. If the argument has validity, the entire application must be denied. This is probably the reason the Commission preferred not to discuss the issue.

Third, the only operators in the intercoastal trade who intermingle regulated service with unregulated foreign service possessed grandfather rights conferred by the statute. There was no flexibility of administrative determination through which the National Transportation Policy could be applied in mandatory grandfather proceedings. Furthermore, the few existing carriers who intermingle intercoastal with foreign operations have not been rate-cutters in foreign trade. Luckenbach sought to prove that Isbrandtsen has and would cut rates, but the Commission excluded such testimony without giving any reason.

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[2] It can be demonstrated that neither limitation is of competitive significance. Thus, Isbrandsten obtained year-round authority from Port Richmond in San Francisco Bay and from Port Hueneme near Los Angeles to all North Atlantic ports. By establishing joint rates through those two ports, it can attract cargo year round from the entire San Francisco and Los Angeles areas. It obtained year-round authority from all Pacific Coast ports to New Haven, Connecticut, and consequently can move cargo to New York City and Boston through that port year round.

2. *The issue of endangering or impairing operations of existing carriers*

The district court said, with respect to the issue of endangering or impairing operations of existing carriers, that the Commission must have considered that issue (a) because it noted that the existing carriers would "suffer a loss of traffic" and it balanced that traffic loss against the fact that "shippers would gain a more frequent service or at least a greater amount of cargo space for which they have shown there is a need . . ."; (b) because the Commission indicated its concern for the welfare of the existing carriers in establishing seasonal, port and cargo restrictions in the certificate; and (c) that in any event "a decrease in revenue or sharing of existing tonnage will not of itself defeat an application." Again the district court misconstrued the problem because it sought to substitute its views of the administrative considerations for those which it and we had a right to expect from the Commission.

First, although the Commission noted that the existing carriers would suffer a loss of traffic, it failed to consider the effect of that loss upon their operations—it did not attempt to juxtapose loss of traffic with the present financial plight of the intercoastal trade. Yet this was the issue which was squarely presented throughout the proceeding. Loss of traffic may have only a miniscule effect upon a strong and profitable operation, but where it has been shown that, year round, there is a need for cargo rather than service, and that the carriers' financial position is desperate, the Commission must do more than balance loss of traffic against shipper need—it must consider the effect of such loss upon the carriers.

Second, as heretofore indicated, the court misunderstood the port, cargo and seasonal restrictions imposed by the Commission—Isbrandtsen having received authority to

operate in the seasons and to carry all the cargo for which it showed an alleged need, and to serve all the port it sought to serve. It is especially significant that the district court relied on these same restrictions to infer that the Commission must have considered two of the three issues urged under the National Transportation Policy—unfair competition and injury to existing carriers. It would follow that whenever the Commission does not grant the full authority sought by an applicant, all the issues presented in opposition to the application must have been administratively considered. This would do away with the necessity for any administrative opinion, and serves to confirm the fact that the district court really read into the Commission's report its own interpretation of the administrative considerations involved. The court attributed reasons to the Commission not remotely justified by the Commission's language.

Third, the court's holding that "a decrease in revenue or a share of existing tonnage will not of itself defeat an application" is in apparent conflict with that of the District Court for the District of Columbia in *Clarke* v. *United States*, 101 F. Supp. 587, 593. In that case the court held:

> "Reference was made hereinabove to a clause in a sentence in the second report of Division 5 upon reconsideration to the effect that the grant of Greyhound's application would 'place the competitive situation on a more normal and sound basis.' The quoted statement is too cryptic to satisfy us that the Commission meant by it to find that there would be *no adverse effects upon Atwood* should the application be granted to Greyhound." (Emphasis added.)

It will be noted that the district court in the *Clarke* case not only refused to stretch general language as to the competitive situation into a resolution by the Commission of the issue of injury to existing carriers, but required a finding that there would be "no adverse effects" upon Atwood.

The lower court in this case, however, did stretch language as to loss of traffic into a finding on impairment of operations, and was satisfied with an implied holding that adverse effects could be balanced by the Commission against the alleged shipper need. Whether impairment or danger to existing carriers alone requires denial of an application, or is merely one of the factors to be considered and balanced against shipper need, is an issue of law which, in this case, is hidden from the reviewing court's view by the insubstantial nature of the Commission's treatment of the issue in its report.

Moreover, although Luckenbach presented the issue of unfair competition as an independent ground for denial of the entire application under the National Transportation Policy, it also has an impact as one factor on the issue of injury to existing carriers. The Commission did not consider unfair competition on either theory, and apparently thought it irrelevant to the case since it excluded evidence on the point. *If unfair competition was thought by the Commission to be irrelevant, a clear issue of law is presented which the courts are entitled to review. They cannot perform this function on the basis of the Commission's report.*

3. *The issue of national defense*

On the third issue raised by Luckenbach under the National Transportation Policy—the national defense issue—the district court erroneously stated that "the record here discloses that the issue of national defense was not raised below." In its petition for reconsideration, Luckenbach had urged that this factor be considered by the Commission before authorizing Isbrandtsen to institute intercoastal service. An extract from Luckenbach's petition for reconsideration, presenting the issue of the national defense factor, is set forth in Appendix C hereto. The

complaint herein is directed not only to the original order of the Commission, but also to the order denying petition for reconsideration. Since denial of the petition for reconsideration was without opinion or comment, it is obvious that the Commission did not consider the issue as presented. Moreover, it should be noted that the Interstate Commerce Act, Section 17(6), 54 Stat. 915, *requires* the Commission to consider a petition for reconsideration filed by a party to the proceeding.[3] The Supreme Court has held it to be in the nature of an appeal. *United States* v. *Abilene & S. R. Co.*, 265 U. S. 274, 281 (1924).[4] The only basis for the decision of the district court was a mistaken assumption that an issue vigorously presented on the record was not presented at all.

4. *The premise underlying the decision below.*

The extent to which the court below strained to sustain the order of the Commission would be difficult to understand were it not for its statement in the body of its opinion that "we do not think it wise or necessary to protract the litigation further by remanding the order for more explicit and seemingly useless discussion." Opinion of the Court Below, Appendix A, p. 30. We do not know why the district court was so willing to assume that a remand would lead to a useless discussion. Unless the case is returned for a determination by the Commission, it is impossible to present the legal question of whether a finding of unfair competition bars a certificate of public convenience and necessity. Similarly, with respect to the

[3] "Any such application [for reconsideration], if the decision, order or requirement was made by the Commission, *shall* be considered and acted upon by the Commission." § 17(6) I. C. A., 54 Stat. 915. (Emphasis added.)

[4] "Division 4 consists of four members. There are eleven members on the full Commission. Under these circumstances, what is here called a rehearing resembles an appeal to another administrative tribunal."

issue of endangering or impairing the operations of existing carriers, the Commission would have to determine whether—as strongly suggested in the *Clarke* case, *supra* —a finding of such injury absolutely bars a certificate or whether it is only one factor to be considered by the Commission in exercising administrative discretion.

Thus it would not be useless to give protesting parties a firm basis for asserting error on issues clearly subject to judicial review and, even more important, to leave Luckenbach, as the losing party, with a sense of having the merits of its administrative case met, particularly where the language of the statute, as hereafter demonstrated, so clearly requires that the agency do so.

C. *The Administrative Procedure Act*

The Commission's disposition of issues raised under the National Transportation Policy without mentioning the Policy or any issue raised under it is contrary to the language, legislative history, and purpose of Section 8(b) of the Administrative Procedure Act.[5] The pertinent provisions of that section, with the significant language emphasized, read as follows:

> "All decisions (including initial, recommended, or tentative decisions) shall become a part of the record

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[5] Neither counsel for the Commission nor any of the intervenors questioned the applicability of the Administrative Procedure Act to the Interstate Commerce Commission in the court below. It has been settled that the Commission is subject to the Act. *Riss & Co.* v. *United States*, 341 U. S. 907 (1951), reversing *per curiam*, on authority of *Wong Yang Sun* v. *McGrath*, 339 U. S. 33, the decision in 96 F. Supp. 452, which had held the Administrative Procedure Act inapplicable to the Interstate Commerce Commission. See also *United States* v. *Carolina F. Carriers Corp.*, 315 U. S. 475, 481 (1942); *Eastern Central M. C. Asso.* v. *United States*, 321 U. S. 194, 206 (1944); *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60, 66-68 (1945); *American Trucking Association* v. *United States*, 326 U. S. 77, 85-86 (1945); *United States* v. *Rock Island M. Trans. Co.*, 340 U. S. 419, 431, 433 (1951).

and include a statement of (1) *findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record;* and (2) the appropriate rule, order, sanction, relief or denial thereof."[6]

1. *The legislative history.*

The legislative history of Section 8(b) shows that in its original form the bill did not explicitly require that the agency give its reasons.[7] It was, however, interpreted in the Senate committee report as requiring reasons.[8] The House committee made the Senate interpretation explicit by amending the bill to require the agency to give its "reasons or basis"[9] for disposing of the issues. Both the House and the Senate committee reports clearly state that "the relevant issues extend to matters of administrative discretion as well as of law and fact."[10] Both committees assumed that agencies would write "opinions

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[6] Administrative Procedure Act, Section 8(b).

[7] Senate Judiciary Committee Print, June 1945, Section 8(b), Sen. Document 248, 79th Cong. 2nd Sess., p. 33. The provisions corresponding to those quoted in the text read as follows:

"All decisions and recommended or tentative decisions shall be a part of the record and include a statement of (1) the necessary findings and conclusions, and the *basis therefor,* upon the material issues of fact, law, or discretion and (2) the appropriate rule, order, sanction, relief, or denial thereof." (Emphasis added.)

[References to the legislative history hereafter are to Senate Document 248, 79th Cong. 2nd Sess., entitled "Administrative Procedure Act, Legislative History."]

[8] The Senate report stated:

"The requirement that the agency must state the basis for its findings and conclusions means that such findings and conclusions must be sufficiently related to the record as to advise the parties of their record basis. Most agencies will do so by opinions which *reason* and *relate the issues of fact,* law and discretion." (Emphasis added.) Senate Document 248, p. 210.

[9] Senate Document 248, p. 273. The comment on the bill by the House committee was substantially the same as that in the Senate report.

[10] Senate Document 248, pp. 210-11, 273.

which reason and relate the issues of fact, law and discretion."[11]

2. *This is not a "findings" or "reasonable basis" case.*

We are aware of the fact that Section 14(1) of the Interstate Commerce Act, 49 U. S. C. § 14(1), does not require the Commission to make detailed findings of fact except in cases where damages are awarded, *Manufacturers R. Co.* v. *United States,* 246 U. S. 457, 487, 490, nor do we claim that this case falls within the cases holding that Section 14(1) does not relieve the Commission of the duty to make the "basic" or "quasi-jurisdictional" findings essential to the statutory validity of an order. *Florida* v. *United States,* 282 U. S. 194, 215; *United States* v. *Baltimore & Ohio R. Co.,* 293 U. S. 454, 464-65; and see the cases collected in *Alabama Great S. R. Co.* v. *United States,* 340 U. S. 216 (1951). The Commission here made routine detailed findings of fact extending over seven or eight closely printed pages in its official reports.

Nor is this a case in which the Commission does not sufficiently explain the basis of its action. We agree that within its four corners the Commission's report presents an intelligible and rational basis for its decision. It does not, therefore, fall within the rule of *United States* v. *Chicago M. St. P. & P. R. R.,* 294 U. S. 499, 511 (1935), "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." See also *Eastern Central Motor Carriers Asso.* v. *United States,* 321 U. S. 194, 212 (1944), holding that there must be "sufficient explication to enable the parties and ourselves to understand, with a fair degree of assurance, why the Commission acts as it does." Cf. *Automatic Canteen Co.* v. *F. T. C.,* 346 U. S. 61, 81 (1953).

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[11] *Id.* at 210, 273.

This case involves the proposition that Section 8(b) of the Administrative Procedure Act is not satisfied by extended routine and detailed findings of fact, and by an apparent rational basis for the result when this is accomplished by avoiding and ignoring altogether the difficult and important issues presented to the agency. A detailed and aimless recitation of the record, not related to the issues of the case, is no substitute for the statutory requirement that the agency, in its report, meet the material issues raised by the parties.

The purpose of Section 8(b) is to free administrative proceedings from any institutionalized method of disposing of complex and delicate questions so that (a) reviewing courts may be presented with the issues of law which are theirs to decide; (b) the courts will be prevented from substituting judicial judgment on administrative issues in order to sustain the result; and (c) the losing party may have the benefit of knowing why he was unsuccessful—the sense of justice being an important part of the administration of justice. The lower court's decision overlooks each of these legislative objectives in holding that remand would be merely for "seemingly useless discussion," Opinion of the Court Below, Appendix A, p. 30.

D. *The Issues Under the National Transportation Policy Are Material Issues*

The National Transportation Policy is the primary means formulated by Congress for effectuating its objectives in the regulation of domestic transportation. The Policy establishes overriding criteria to be applied by the Commission in exercising the powers conferred by the Act, and by its terms the Policy provides that "all the provisions of this [Interstate Commerce] Act shall be administered and enforced with a view to carrying out the above

declaration of policy,"—a clause which has the effect of repeating the Policy as a part of each provision of the Act, and requires the Commission to consider all the relevant factors of the Policy in every proceeding. Thus, the Supreme Court has held it to be the Commission's guide to the interpretation and application of the entire statute,[12] including the provisions relating to the granting of common-carrier authority.[13]

The National Transportation Policy,[14] with emphasis on the language bearing on each of the three issues raised by Luckenbach, reads (paragraphing, numerals and emphasis added):

> "It is hereby declared to be the national transportation policy of the Congress
>
> 1) to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each.
>
> 2) to promote safe, adequate, economical, and efficient service and *foster sound economic conditions in transportation* and among the several carriers;
>
> 3) to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or *unfair or destructive competitive* practices;
>
> 4) to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;

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[12] *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 82-84 (1944); *United States* v. *Great Northern Railway Co.*, 343 U. S. 562, 576 (1952); *King* v. *United States*, 344 U. S. 254 (1952).

[13] *United States* v. *Carolina F. Carriers Corp.*, 315 U. S. 475, 481 (1942); *Eastern Central M. C. Asso.* v. *United States*, 321 U. S. 194, 206 (1944); *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60, 66-68 (1945); *American Trucking Association* v. *United States*, 326 U. S. 77, 85-86 (1945); *United States* v. *Rock Island M. Trans. Co.*, 340 U. S. 419, 431, 433 (1951).

[14] 54 Stat. 899, 49 U. S. C. A. preceding §§ 1, 301, 901, and 1001.

5) all to the end of developing, coordinating, and preserving a national transportation system by water, highway and rail, as well as other means, *adequate to meet the needs* of the commerce of the United States, of the Postal Service, and *of the national defense.*

All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

1. *Unfair competition is a material issue.*

The Commission has consistently held that mingling regulated with unregulated carriage presents an opportunity for unfair competition requiring denial of the application, *Geraci Contract Carrier Application,* 7 M. C. C. 369, 372-73; *Shoemaker Common Carrier Application,* 44 M. C. C. 765; *A. F. Coats Lumber Co., Contract Carrier Application,* 265 I. C. C. 715 (1950); *Bales Common Carrier Application,* 9 M. C. C. 709; *Watkins Motor Lines, Extension-Processed Nuts,* 51 M. C. C. 131 (1949); *L. H. Hardman, Contract Carrier Application,* 48 M. C. C. 715 (1948). The principle also applies to water-carrier cases, *American Coastal Lines, Inc, Permit Transfer,* 285 I. C. C. 323, 337.

2. *Impairing or endangering the operations of existing services is a material issue.*

The Commission has repeatedly held that impairing or endangering the operations of existing services requires denial of an application, for example, *Pan American Bus Lines Operations,* 1 M. C. C. 190, 203; *Chief Refrigerator Truck Lines, Inc., Extension,* 34 M. C. C. 492, 495; this applies to water-carrier applications, *Arrow Line Extension of Operations—Gulf Ports,* 265 I. C. C. 347 360; and it was held that a determination on that issue "must be made" before certificating an intercoastal carrier, *West Coast Trans-Oceanic S. S. Line Com. Car. Application,* 285 I. C. C. 381,

which was a companion proceeding to this one, decided one day earlier.

3. *The national defense issue is a material issue.*

The Commission has held the national defense to be an important factor in war, *Increased Freight Rates* 1951, 281 I. C. C. 557; and peace, *Passenger Fares Between D. C. and Nearby Virginia,* 270 I. C. C. 651 (1948). The Supreme Court has commended consideration of the national defense factor in peacetime, *United States* v. *Capital Transit,* 338 U. S. 286 (1949), and the Commission has been reversed by a three-judge court for failing to consider the defense factor in peacetime, *Cantlay & Tanzola* v. *United States,* 115 F. Supp. 72 (1953). The full Commission voted not to appeal the *Cantlay & Tanzola* case, with only one dissent, *Traffic World,* December 19, 1953, p. 52.

E. *Unexplained Conflicting Administrative Determinations*

One day prior to the decision of Division 4 in this proceeding, the same division decided *West Coast Trans-Oceanic S. S. Line Com. Car. Application,* 285 I. C. C. 381 (hereafter the *"WCTO"* case), in which it denied in its entirety an application for authority to operate a two-way intercoastal steamship service. Despite the fact that the two cases paralleled each other throughout the administrative process, and that portions of the record in *WCTO* were incorporated in this case by stipulation of the parties, the Commission's report in neither case refers to the other, and for all that appears from the final reports they were entirely isolated and unrelated proceedings. Conceivably the Commission might have granted both applications on the basis of evidence as to the same need.

In its petition for reconsideration to the Interstate Commerce Commission, as well as in its complaint and brief

before the lower court, Luckenbach pointed to irreconcilable conflicts in the determinations of the Commission. The Commission denied the petition for reconsideration without opinion, and the lower court answered Luckenbach's complaint by explaining how the ultimate results of the two cases could be reconciled, despite the fact that Luckenbach never maintained before the Commission or before the Court that the two cases could not be disposed of the way in which they were decided. Its position was that certain determinations essential to granting a certificate to Isbrandtsen were irreconcilable with determinations actually made in the *WCTO* case, and for that reason—at least in the absence of any explanation by the the Commission—the Commission's action in granting a certificate in this case was arbitrary and capricious.

Thus Luckenbach agrees that failure of WCTO to prove that its proposed operation would be profitable, alone warranted denial of the entire WCTO application, without conflicting with any determination in this case. However, the Commission did not rest its decision in the *WCTO* case on that ground alone. It also found (1) that additional service would impair or endanger existing service; (2) that the alleged need eastbound from most Northwest ports was only temporary; (3) that service eastbound from San Francisco was adequate and did not require additional service; and (4) that the fact that Redwood City did not have direct local intercoastal service but had to ship via trucks through nearby San Francisco Bay ports was not sufficient justification for finding a need for additional service. Each of these determinations was in direct conflict with similar determinations essential to granting the Isbrandtsen certificate. In *Isbrandtsen* the Commission held (1) that sharing traffic with existing carriers would not impair or endanger existing service; (2) that the need

for eastbound service from the Northwest lumber ports was permanent and therefore justified the granting of authority from those ports; (3) that service from San Francisco Bay was inadequate for seven months each year; and (4) that since the port of New Haven did not have direct local service but had to receive its cargoes through either New York or Boston, that ground alone warranted certification of a new carrier to New Haven.

Although these parallel holdings are in direct conflict with each other—particularly the holding as to impairing and endangering the operations of existing services, which was based on identical evidence as to the financial condition of the certificated carriers [15]—it was not Luckenbach's position that the Commission could not make conflicting determinations. The contention urged both before the Commission and before the lower court was that in order for conflicting factual determinations to be legally supportable the Commission must explicate the basis for such determinations: it cannot completely ignore its own contrary findings in similar cases decided but one day apart and to a certain extent based upon the same evidence; to do so is the epitome of arbitrary and capricious administrative action.

III

Conclusion

In closing, we suggest that the failure of the lower courts to hold administrative agencies to the standard established by Section 8(b) of the Administrative Procedure Act has caused concern to the bar generally (6 Administrative Law Bulletin, 83-85 (1953)). In the body of this statement we have sought to confine our discussion of the substantiality of the questions involved closely to the specific problems

[15] That portion of the record in WCTO dealing with this subject was incorporated in the *Isbrandtsen* case by stipulation.

raised by this case. In the light however, of the general reluctance of the lower courts to apply fully the criterion of the statute, and particularly in view of the fact that the standards of the Administrative Procedure Act were legislatively developed, to a large extent, as a result of experience in proceedings before the Interstate Commerce Commission, it may be that the Supreme Court should, at this time, lay down a general guide for the agencies and the courts in the interpretation and application of Section 8(b) of the Administrative Procedure Act.

For the foregoing reasons we believe that the questions presented by this appeal are substantial and of public importance.

Respectfully submitted,

BURLINGHAM, HUPPER & KENNEDY,
27 William Street,
New York 5, New York,
By ROSCOE H. HUPPER,
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ODELL KOMINERS,
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MARK P. SCHLEFER,
Of Counsel.

March 22, 1954.

APPENDIX A

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 90-130

LUCKENBACH STEAMSHIP COMPANY, INC., *Plaintiff*,

against

THE UNITED STATES OF AMERICA, et al., *Defendants*

Before Augustus N. Hand, Circuit Judge, and Irving R. Kaufman and Dimock, District Judges

Burlingham, Hupper & Kennedy, Harold M. Kennedy, Attorneys for Plaintiff; Odell Kominers, Henry G. Fischer and Mark P. Schlefer, of counsel.

Stanley N. Barnes, Assistant Attorney General; J. Edward Lumbard, United States Attorney; James E. Kilday and John Guandolo, Special Assistants to the Attorney General, Attorneys for Defendant United States of America.

Edward M. Reidy, Chief Counsel, and Allen Crenshaw, Associate Chief Counsel, Attorneys for the Interstate Commerce Commission.

John J. O'Connor, William L. McGovern and Abe Krash, Attorneys for Intervenor, Isbrandtsen Company, Inc.; Arnold Fortas & Porter, of counsel.

Crowell & Rouse, Attorneys for Intervenor, Parr-Richmond Terminal Company; E. Curtis Rouse, of counsel.

Paul Goldstein, Attorney for New Haven Chamber of Commerce.

AUGUSTUS N. HAND, Circuit Judge:

This is an action by the Luckenbach Steamship Company to enjoin an order of the Interstate Commerce Commission granting a certificate of public convenience and necessity to the Isbrandtsen Company, Inc. Since the Commission's order was to go into effect December 28, 1953, a restraining order was granted by Judge Kaufman on December 21,

1953, pending a hearing and determination of the action by a three-judge court. The court was convened, pursuant to 28 U. S. C. §§ 2325, 2284, and a hearing was held at which counsel appeared for Luckenbach, Isbandtsen, the Government, Parr-Richmond Terminal Co., and the New Haven Chamber of Commerce.

In general the certificate authorizes Isbrandtsen to operate its ships as a common carrier in eastbound intercoastal trade from Pacific Coast ports to Atlantic Coast ports. This includes (1) regular fortnightly service in the transportation of passengers and commodities generally from Pacific Coast ports, except Richmond and Port Hueneme, to Atlantic Coast ports during the period August through February, (2) regular fortnightly service of passengers and commodities from Richmond and Port Hueneme to Atlantic Coast ports, (3) regular fortnightly and irregular service of passengers and commodities from Pacific Coast ports to New Haven, Connecticut, (4) irregular service in the transportation of commodities generally from a limited number of ports in California south of Eureka to Atlantic Coast ports during August through February, and (5) irregular service in the transportation of wood pulp, wood flour, and lumber from certain Pacific Coast ports north of and including Eureka to Atlantic Coast ports. The Commission based parts one and four of its order on findings of inadequate eastbound service from the west coast during the peak season, from August through February. Year round eastbound service for the ports of Richmond and Port Hueneme in California, and New Haven, Connecticut, was authorized because of lack of service at those ports at present. Irregular service from ports north of and including Eureka, California, was authorized to meet a need for shipping space for the commodities named. Since the Commission found westbound service adequate, only a carrier capable of profitably carrying out eastbound trade alone could be authorized by the Commission to fulfill these needs. Isbrandtsen was found to be in such a position since it could use its ships presently in round the world trade for completing the leg of that journey from the west coast to the east coast and these ships were found

to have adequate shipping space available to carry on the basic service granted by the certificate.

Luckenbach attacks the order of the Commission because of its failure affirmatively to pass on certain issues that are said to have been properly before it. It is urged that the order should be remanded to the Commission because it does not deal with the problems of national defense, unfair competition, and possible detrimental effect on existing carriers. National defense is said to be involved because it would be to the military advantage to have ships involved in coastal routes always present in coastal waters in the event of war. Since Isbrandtsen will use ships in its round the world route to carry out the proposed eastbound service, the national defense would not be served. Unfair competition is charged because Isbrandtsen, unlike Luckenbach, carries on unregulated foreign service which would enable it to give rebates in that trade to shippers who also use its services in the proposed coastal routes. Moreover, it is claimed that Isbrandtsen's foreign service is self-sustaining and any revenue received from the proposed service would be added profit, thus giving them a competitive advantage over the existing carrier Luckenbach. The third charge is that the Commission failed to consider the detrimental effect the granting of the certificate would have on existing carriers. This is clearly a material issue and the failure of the Commission to consider it has been grounds for reversal of its order. Clarke v. United States, 101 F. Supp. 587, (D. C. D. C.).

Under Section 14 (1) of the Interstate Commerce Act, 49 U. S. C. § 14(1) the Commission is not required to make detailed findings of fact except in a case where damages are involved. Manufacturers R. R. Co. v. United States, 246 U. S. 457, 489-490. The ultimate findings required by law are only that the applicant is fit, willing and able to perform the proposed service and that the service will serve the public convenience and necessity, 49 U. S. C. § 909(c). Such findings were made here. However, Luckenbach charges that under Section 8 (b) of the Administrative Procedure Act, 5 U. S. C. § 1007(b), the Commission must affirmatively make findings on the subsidiary issues discussed above.

Their argument is based on the fact that these considerations are part of the National Transportation Policy enacted in 1940:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation on all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act [I. C. A.] shall be administered and enforced with a view to carrying out the above declaration of policy." (54 Stat. 899, (1940), 49 U. S. C. A. § 901n (1951).

It is clear that this expressed policy must serve as a guide to the Commission in all its decisions. United States v. Great Northern R. Co., 343 U. S. 562, 576; McLean Trucking Co. v. United States, 321 U. S. 67, 82-84. However it seems equally clear that the Commission can not and should not be required to discuss each consideration expressed in the National Transportation Policy in every decision it renders. "[T]he basic findings essential to the validity of a given order will vary with the statutory authority invoked and the context of the situation presented." Alabama Great Southern R. Co. v. United States, 340 U. S. 216, 288. It is only necessary that the essential basis of the Commission's order appear in the report so that a court can satisfy itself that the Commission has performed its function. See

Newtex S. S. Corp. v. United States, 107 F. Supp. 388, (S. D. N. Y.), affirmed, 344 U. S. 901; Capital Transit Co. v. United States, 97 F. Supp. 614, 621, (D. C. D. C.).

In support of their argument that failure to discuss national defense requires us to remand the order to the Commission, Luckenbach relies on Cantlay & Tanzola, Inc. v. United States, 115 F. Supp. 72, (S. D. Cal.). There an order of the Commission approving reduced rates filed by the railroad was remanded for a failure to discuss national defense. The proposed rates were filed to block efforts to construct a pipeline from Texas to California and these lower rates would be likely to result in putting existing truck carriers out of business. Thus, instead of three modes of transportation for carrying the strategic material oil in the future, the new rates might result in railroads being the only carrier left in the field. The issue was strongly raised below and five members of the Commission dissented from the order pointing out that national defense was a strong consideration in the case. In the light of the "* * * manifest considerations of national defense involved and the silence of the majority report on that essential basis for the order * * *" the court annulled the Commission's decision. 115 F. Supp. at 81-82.

In contrast the record here discloses that the issue of national defense was not raised below. Nor is it clear that there is any substantial interest of national defense involved or violated. The need for the proposed service was established and in the "context of the situation presented" we do not think an affirmative discussion of national defense was necessary to validate the order.

As to the detrimental effect on existing carriers, we think the Commission in its order clearly did pass on this issue. It recognized that: "If the proposed service is authorized, applicant would necessarily have to share some of the existing traffic with the certificated carriers. Although some of the latter carriers would suffer a loss of traffic, the shippers would gain a more frequent service or at least a greater amount of cargo space, for which they have shown there is a need during the period August through February." Furthermore in restricting the proposed service to peak

periods, sharply limiting the ports to be served by year round service, and limiting the products that can be carried from ports in the northwest, the Commission has shown that it gave due consideration to the position of existing certificated carriers. A decrease in revenue or sharing of existing tonnage will not of itself defeat an application. Where, as here, it is shown that the proposed service will serve the needs of the public, and the transportation system, then the application may be granted. Norfolk Southern Bus Corp. v. United States, 96 F. Supp. 756, 760-61, (E. D. Va.); Inland Motor Freight v. United States, 36 F. Supp. 885, 888-89, (D. C. Idaho). Moreover, it is for the Commission to decide whether the granting of the certificate in such a case is in the public interest. United States v. Pierce Auto Freight Lines, Inc., 327 U. S. 515, 535-36. And the general rule is that: "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." Mississippi Valley Barge Line Co. v. United States, 292 U. S. 282, 286-87.

The charge of unfair competition also seems clearly to have been considered by the Commission. The report notes that Isbrandtsen is at present engaged exclusively in unregulated foreign trade and that the fulfillment of the regular fortnightly service would be carried out by its ships as part of their round the world route. Isbrandtsen's certificate was sharply limited as to ports to be served, commodities to be transported, and time during the year when service could be rendered. Thus it is clear that the Commission weighed the need for the services against the possibility of unfair competition and found that with the limitations of the certificate and the close regulation which accompanies the receipt of such approval, the public convenience and necessity would be served by permitting the proposed service. This has been done before. See A. F. Coates Lumber Co. Contract Carrier Application, 265 I. C. C. 715 (1950). Luckenbach relies on administrative decisions of the I. C. C. to establish the validity of the unfair competition argument but in those decisions the Commission also failed to find a need for the service proposed. Geraci Contract Carrier Application, 7 M. C. C. 369 (1938);

Parke & Son, Inc. Extension-Numerous States, 51 M. C. C. 422, 440 (1950). Moreover the record here shows that there are other carriers in the intercoastal trade who are at present engaged in foreign trade. There is no evidence to show that this has resulted in unfair competitive practices. Thus, where the issue raised does not seem of manifest importance and the Commission has indicated that it has considered it, we do not think it wise or necessary to protract the litigation further by remanding the order for more explicit and seemingly useless discussion.

The plaintiff's final claim is that the findings of the Commission are arbitrary and capricious because they are inconsistent with those made in West Coast Trans-Oceanic Steamship Line Common Carrier Application, Docket No. W-1019 (September 9, 1953). An attempt is made to prove this by extracting phrases from that order and attaching undue significance to them, but a report of the Commission must be read as a whole. Newtex S. S. Corp. v. United States, *supra*. West Coast applied for a certificate for intercoastal traffic generally, but the Commission, finding no need for additional westbound tonnage, denied the application because it was not shown that West Coast could operate profitably in eastbound trade alone. In the words of the Commission: "we are convinced that without authority to operate its ships in westbound service, any attempt to perform eastbound service only would prove unsuccessful and should be denied." The position of Isbrandtsen is clearly distinguishable in view of its proposal to use its ships now in round the world trade to carry on the eastbound service.

Accordingly, the restraining order granted by Judge Kaufman is dissolved and the complaint is dismissed.

Dated January 22nd, 1954.

AUGUSTUS N. HAND,
United States Circuit Judge.
IRVING R. KAUFMAN,
United States District Judge.
E. J. DIMOCK,
United States District Judge.

APPENDIX B

INTERSTATE COMMERCE COMMISSION

No. W-1041

ISBRANDTSEN CO., INC., COMMON CARRIER APPLICATION

Submitted May 29, 1953. Decided September 10, 1953

Public convenience and necessity found to require applicant's operation as a common carrier by self-propelled vessels to include (1) a regular fortnightly service in the transportation of passengers and commodities generally from the Pacific coast ports, except Richmond and Port Hueneme, Calif., designated in the appendix as regular ports, to all Atlantic coast ports, except New Haven, Conn., named in the appendix, during the period August through February, (2) a regular fortnightly service in the transportation of passengers and commodities generally from Richmond and Port Hueneme, Calif., to all Atlantic coast ports named in the appendix, (3) a regular fortnightly and irregular service in the transportation of passengers and commodities generally from all Pacific coast ports named in the appendix to New Haven, Conn., (4) an irregular service in the transportation of commodities generally from the ports in California south of Eureka designated as irregular ports in the appendix to all Atlantic coast ports named in the appendix, during the period August through February, (5) an irregular service in the transportation of wood pulp, wood flour, and lumber from the Pacific coast ports named in the appendix, Eureka and north thereof, to all Atlantic coast ports named in the appendix. Application in all other respects denied. Certificate and order issued.

John J. O'Connor for applicant.

Odell Kominers, Mark P. Schlefer, Robert S. Hope, George F. Galland, J. A. Stumpf, Warren Price, Jr., W. N. Pendleton, F. X. Masterson, John J. Emerick, L. A. Larzelere, W. Wallace Wilhite, Gerald H. Trautman, Miriam

E. Wolff, Edward D. Ransom, J. Kerwin Rooney, and Robert N. Kharasch for protestants.

William G. Symmers, Willis R. Deming, S. H. Moerman, Edward K. Laux, Jefferson H. Myers, David E. Scoll, Charles H. Vaughn, Sidney Goldstein, Wilber La Roe, Jr., Frederick E. Brown, and Arthur L. Winn, Jr., for interveners.

REPORT OF THE COMMISSION

Division 4, Commissioners Mahaffie, Johnson, and Mitchell

By Division 4:

Exceptions to the examiner's proposed report were filed by the applicant, protestants, and interveners, and replies were filed thereto. We have heard the parties in oral argument. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

By application filed December 3, 1951, as amended, under section 309 (c) of the Interstate Commerce Act, Isbrandtsen Co., Inc., doing business as Isbrandtsen Lines, an offshore operator in foreign commerce, engaged in the transportation of commodities generally and passengers, seeks authority to operate as a common carrier by selfpropelled vessels of commodities generally and passengers from Pacific coast ports to Atlantic coast ports north of Cape Henry, Va., as described in the appendix in intercoastal trade through the Panama Canal. Lukenbach Steamship Company, Inc., Pope & Talbot, Inc., American-Hawaiian Steamship Company, Waterman Steamship Corporation (Arrow Line), American President Lines, Ltd., class I rail carriers in western trunkline territory, Pacific Southwest Railroad Association, trunkline and New England railroads, except The Chesapeake and Ohio Railway Company, and The Port of New York Authority oppose the application. The Board of State Harbor Commissioners for the port of San Francisco Harbor, Howard Terminal, Encinal Terminals, and the Board of Port Commissioners of the City of Oakland, Calif., withdrew their opposition when advised that Redwood City, Calif., was not a port to be served under the proposed service. The West Coast Trans-Oceanic Steamship Line intervened as its interests may appear.

Applicant is a New York corporation, the stock of which is entirely owned by American citizens. It or its predecessor companies have been engaged in common carrier operations for 34 years. Its principal common carrier operation is fortnightly sailings from Atlantic coast ports eastward, around the world through the Mediterranean via the Suez Canal, thence to India, the Orient, San Francisco and Los Angeles, Calif., thence through the Panama Canal to New York, N. Y., Philadelphia, Pa., Baltimore, Md., and Hampton Roads, Va., in the order mentioned. Until the disruption of the Orient service, Boston, Mass., was a regular port of call and was served immediately after New York. After unloading at Hampton Roads, the ships are loaded at the Atlantic ports in the reverse order before departing for the Far East. If New Haven, Conn., should be included in the service, it would be served either before or after New York. In addition to the common carrier service described above, applicant also provides this type of service to Europe and South America, as well as a tramp service consisting mostly of full shiploads by vessels not engaged in a regular schedule. It also is engaged in the export-import business, which is conducted as a division of the corporation. Among other things, it imports rubber, jute, burlap, green coffee, and sugar, and exports sugar, steel, coffee and coal. It carries its own commodities when convenient to do so.

Under its proposed service applicant would make about 26 sailings per year on regular routes from San Francisco, Alameda, Berkeley, Oakland, Richmond, Los Angeles, San Pedro, Long Beach, and Port Hueneme, Calif. Calls at the last-named port would be subject to availability of cargo. In addition to the aforenamed regular ports of call, irregular service is proposed from 19 ports[16] in the States of Washington, Oregon, and California. On the North Atlantic coast the proposed regular service is to the ports of Boston, New Haven, New York, Philadelphia,[17] Baltimore,

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[16] Aberdeen, Anacortes, Bellingham, Bremerton, Everett, Grays Harbor, Longview, Seattle, Tacoma, and Willapa, Wash., Astoria, Coos Bay, Newport, Portland, and Yaquina Bay, Oreg., and Eureka, San Diego, Sacramento, and Stockton, Calif.

[17] Includes Philadelphia Harbor as described in Ex Parte No. 145.

and Norfolk and Newport News, Va. Irregular sailings would be made to Wilmington, Del., Chester, Pa., Camden, Newark, and Jersey City, N. J., Bridgeport and New London, Conn., and Providence, R. I. The appendix hereto shows applicant's proposed service and the carriers authorized to serve these ports.

Applicant's ships arriving at the Pacific coast would load intercoastal cargo first at the San Francisco Bay ports thence at Los Angeles Harbor ports. Although applicant does not propose to use its regular round-the-world ships to serve the irregular ports, it, however, does propose to charter suitable American vessels or use such vessels returning from offshore trade as the service requires.

The following table shows the names of the ships owned by applicant, their speed, bale capacity in cubic feet, deadweight tonnage, and year built:

Name of vessel	Speed	Bale capacity in cubic feet	Dead-weight tonnage	Year built
	Knots per hour			
Flying Arrow	15½	537,000	9,548	1944
Flying Clipper	15½	543,000	10,894	1944
Flying Cloud	15½	542,000	10,078	1944
Flying Eagle	15½	542,824	10,410	1944
Flying Foam	14	446,000	8,245	1944
Flying Independent	15½	457,000	9,138	1944
Flying Spray	15	446,000	8,245	1944
Flying Trader	15½	492,000	10,825	1945
Bylayl	10	219,000	5,550	1916
Brooklyn Heights	15½	492,000	10,830	1945
Columbia Heights	15½	491,000	10,833	1945
Jonancy	10	219,000	5,550	1915
Remsem Heights	15½	492,000	10,882	1945
Sir John Franklin	15½	457,000	9,097	1944
Flying Enterprise II	15	542,824	10,445	1944

All of the owned ships are used in common carrier service except the Jonancy and Bylayl. Approximately 35 ships are used in common carrier service. During the past 2 years from 65 to 80 ships per year have been used in all services. Ten of the owned ships are used in the round-the-world common carrier service from the North Atlantic ports to the Far East. They consist of C-2's, C-1's, and Victory-type ships. These 10 ships are equipped with deep tank facilities for petroleum products and 4 are equipped to carry coconut oil in tanks.

A total of 928 people are employed by applicant, 198 in the New York office. Branch offices are maintained in Philadelphia with 5 employees, New Orleans, La., with 10, Houston, Tex., with 6, Galveston, Tex., with 2, Chicago, Ill., with 4 Los Angeles with 3, and San Francisco with 5. There are 8 full-time solicitors in New York and 3 or 4 others engaged part time in this work and 2 each at Los Angeles, San Francisco, and Philadelphia.

Applicant's ships arriving in San Francisco have available space for 3,000 to 4,000 tons of general cargo, which space would be utilized in its proposed fortnightly intercoastal service. Approximately 60 percent of this space would be held for cargo moving from San Francisco and the remainder of the space would be assigned to cargo from Los Angeles. The necessity of unloading foreign cargo at the North Atlantic ports makes it impractical to use all the available space at San Francisco and Los Angeles for such cargo destined to Europe or the Far East.

There are presently 12 carriers (see appendix) having authority to operate as common carriers in intercoastal trade. Of these carriers, American Foreign Steamship Corporation, United States Lines Company, and Northland Transportation Company are not operating at the present time. With the exception of the American Foreign, which has only authority to carry lumber east bound and sulphur westbound, all the common carriers are authorized to transport general cargo. Union Sulphur and Oil Corporation and Palantic Steamship Company, Incorporated, contract carriers, are authorized to transport lumber eastbound from ports applicant proposes to serve.

Most of the certificated carriers have experienced considerable difficulty in reestablishing their service since the end of World War II, there having been no service during the war period. During the immediate postwar period and to some extent to the present time their operations have reflected a loss of revenue. With the start of the Korean War in 1950, the service was again disrupted by the chartering of their more efficient types of ships to offshore operators and their replacement with less efficient ships chartered from a Government agency. Charter revenues de-

rived from Government operation of their ships, as well as such revenues obtained from private charter to offshore operators, has had a detrimental effect on intercoastal service. Since February 1952, chartering of ships has ceased to be as profitable a business as during the period immediately following the Korean War and most of the ships are again available for intercoastal service.

During the year 1950, there moved from the Pacific to the Atlantic and Gulf coast ports through the Panama Canal 5,530,016 gross tons of cargo, of which 3,115,328 tons consisted of mineral oils moving to a great extent in bulk cargo. During the same period 575,436 net tons of canned fruits, vegetables and preparations moved from the South Pacific ports in domestic commerce, of which 488,210 tons moved to North Atlantic ports. The following table shows the net tons of dry cargo moving in intercoastal service during the year "1949," from the Caliorfnia ports of Los Angeles and San Francisco to North Atlantic ports:

To—	From San Francisco, Calif.	From Los Angeles, Calif.	Total net tons
Boston, Mass	71,837	15,916	87,753
New York, N. Y	254,487	88,616	343,103
Camden, N. J	9,022	72	9,094
Philadelphia, Pa	97,147	14,332	111,479
Baltimore, Md	36,031	5,257	41,288
Norfolk, Va	20,287	1,990	22,277
Other	11,990	1,352	13,342
Total	500,801	127,535	628,336

This table shows that more than half of the dry cargo moved to the port of New York and that approximately 80 percent moved from the Port of San Francisco. The prewar average for general eastbound cargo to this port was 820,272 net tons and for lumber 716,118 net tons. During 1950 the average for general cargo eastbound to the port of New York was 681,770 net tons and for lumber 844,595 tons. The substantial decrease in general cargo 1950 compared with prewar was to a great extent offset by an increase in volume of lumber transported. An analysis of the 1951 movement by intercoastal carriers to New York shows a decrease under 1950 which could have been caused by the curtailment of service to the port by Arrow Line and States Steamship Company (Quaker Line). There

was little change in the volume transported by the two principal general cargo carriers, American-Hawaiian and Luckenbach, 1950 compared with 1951. The 3 principal lumber carriers, namely, Pope & Talbot, Weyerhaeuser Steamship Company, and Calmar Steamship Corporation, delivered 440,303 tons of lumber to New York in 1950 and 470,230 tons in 1951, or an increase in tonnage of approximately 7 percent.

In 1939, 8 intercoastal carriers, not including the Arrow Line and American President Lines, made 323 eastbound sailings from San Francisco and 326 sailings from Los Angeles to North Atlantic ports. During 1951, 6 carriers, including the 2 last mentioned, made 101 eastbound sailings from San Francisco and 89 from Los Angeles. Using the peak months of March and September, the following table compares the years 1938 and 1951 with respect to the number of sailings, deadweight tonnage capacity and bale cubic foot capacity of vessels eastbound from Pacific Coast ports to New York:

Year	Vessel sailings	Deadweight tonnage capacity	Bale cubic foot capacity
1938			
March	21	197,688	10,175,000
September	24	230,692	11,968,000
1951			
March	12	141,755	6,902,000
September	8	98,398	4,408,000

It will be noted that there was not only a substantial decrease 1951 under 1938 in the number of sailings, but there was also a large decrease September under March 1951. A comparison of the deadweight tonnage capacity of the ships involved indicates vessels of greater capacity were used in 1951 than in 1938.

A comparison of the advertised sailings from the west coast ports listed below to New York for the period January through May for the years 1951 and 1952 are set forth below:

From	1951	1952
Seattle, Wash.	24	1
Tacoma, Wash.	3	0
Portland, Oreg.	35	13
Stockton-Sacramento, Calif.	22	17
Oakland-Alameda, Calif.	27	27
San Francisco, Calif.	32	25
Los Angeles, Calif.	33	29

In addition to the sailings listed in the above table from Pacific coast ports to New York, Calmar made 12 arrivals at New York from the Pacific coast ports in 1951 compared with 14 in 1952; Pope & Talbot made 11 arrivals in 1951 compared with 8 in 1952, and Weyerhaeuser made 10 arrivals in 1951 compared with 31 in 1952. Analysis of the sailings shows an overall decrease in service 1952 under 1951 and 1951 under 1938 from the Pacific coast ports to New York, which port receives more than half of the traffic moving to the North Atlantic ports.

More than 30 witnesses representing shippers, chambers of commerce, port organizations, and other interests testified in behalf of the proposed service. With the exception of a witness for the National Wool Growers Association and the National Wool Marketing Corporation, a witness for a manufacturer of electrical equipment and one for a manufacturer of washing compounds, the shipper witnesses represented packers and distributors of canned vegetables and fruits and other food products produced on the Pacific coast, principally in the State of California. In addition to the interested shippers, there appeared terminal companies, chambers of commerce, and other organizations in support of the establishment of the proposed service at the port of Richmond and Port Hueneme on the Pacific coast and the port of New Haven on the Atlantic coast. The certificated carriers have discontinued their regular direct service to the port of Richmond and will not send a ship to this port unless there is a specified minimum tonnage available. Applicant could discharge cargo at this port in its round-the-world service and would be able to load the available cargo such as steel pipe and canned goods that would move if cargo space were now available at Richmond, the terminal facilities being adequate for the proposed service.

The Arrow Line is authorized to serve Port Hueneme but does not provide service at the present time. There are approximately 10,000 tons of dried beans, canned goods, and machinery, annually, now moving through Los Angeles Harbor that would move through this port if intercoastal service were available. It is estimated that the greater

distance of approximately 76 miles to the latter port costs the shippers around $2 per ton more than what it would cost to ship through Port Hueneme. Shippers testifying in support of the proposed service are not requesting regular service but desire service as tonnage is available, which service applicant proposes to furnish. The port facilities are adequate for this purpose.

The port of New Haven presently is not served by intercoastal carriers although shippers have asked for this type of service. There is a large area tributary to the port that would benefit from the proposed service in the form of lower transportation costs, the port having adequate facilities that could be used for this purpose. Several shippers, as well as various port and other organizations, support the establishment of this service. Applicant's estimate that approximately 1,500 tons per vessel would move through this port is supported by the evidence adduced by the interested shippers. This tonnage is presently moving through the ports of New York and Boston.

The protestants oppose applicant's proposed service to the port of New Haven on the ground that the shippers and receivers of freight are now adequately served through the ports of New York and Boston, and that no additional traffic is being added. In *Pan-Atlantic S. S. Corp. Extension—Houston*, 285 I. C. C. 33, 48-49, division 4 said:

We are constrained, also, to agree that shippers at or adjacent to ports other than New York are entitled to service through the ports to which they are logically tributary, if such service is economically feasible.

The volume of cargo that shippers indicate would be available removes any doubt concerning the question of whether the service would be economically feasible. Although the proposed service would divert traffic from the certificated carriers serving New York and Boston, such diversion, there being no other reason, should not deprive the port of New Haven of a new and improved service.

Approximately half of the shippers supporting the proposed service are engaged in the processing of fruits and vegetables, much of which move as canned goods in intercoastal service through the California ports to the North Atlantic ports that applicant proposes to serve. They tes-

tified generally for a more adequate service to the North Atlantic ports during the peak shipping months of August, September, October, and November, as well as for the period of approximately 6 weeks prior to the first day of March. The latter period creates a shipping problem because of the desire of the processors and distributors of canned goods to avoid a California tax collected on canned goods in their warehouses on the first day of March of each year.

There was little criticism of significance to the established service furnished prior to the year 1950. During the latter year and since that time, there was indicated a general desire for a more frequent service and some evidence of failure on several occasions to get shipments on the ships desired, requiring a delay until the arrival of the next vessel. Most of the delays were attributable to the consignees designating a particular carrier, thereby precluding the use of vailable free space on the ships of other carriers performing a similar service. Some discontent could be attributed to the failure to request space within a reasonable time. It, however, is apparent that in order to secure space for the peak and tax shipping periods, the shippers must book space 30 to 60 days in advance of the shipping date. This early booking was not always a guarantee of moving all of the available cargo because of the inability of shippers to estimate the volume of their movement that far in advance of the shipping date. In some instances they did not ship as many tons as were booked but the general trend was not sufficient space during the period August through February of each shipping season since the year 1950. This is attributable to the interruption of the normal service of the certificated carriers by the Korean War and the increasing volume of canned goods and other types of cargo available for intercoastal service plus the lack of westbound cargo that will be discussed in greater detail hereinafter.

Very little evidence was adduced in support of the irregular service from the ports in Washington and Oregon and Eureka, Calif. Approximately 125,000 tons of woodpulp are produced annually at the ports of Everett and Anacortes, Wash., and Coos Bay, Oreg., that moves to Philadelphia, Wilmington, Del., and Albany, N. Y. The bulk of this traffic is now moving by rail. Although the certificated carriers

were providing adequate service prior to the Korean War, they have not since that date and it is not certain that they will in the future. There is also a movement of approximately 10,000 tons annually of wood flour from Tacoma that could move in intercoastal service to Newark. The present all-rail differential over the water-rail rates appears to favor the rail movement on this commodity at this time. In addition to the wood pulp and wood flour movements, a few shippers of food items evidenced an interest in additional service of this nature from the North Pacific coast ports.

Prior to World War II, approximately 30,000 tons of wool moved from the Pacific coast ports to North Atlantic ports, the bulk of which moved in intercoastal service through the port of Boston. The movement is now by other forms of transportation. It is estimated that 66 per cent of the wool produced in 8 Western States, amounting to 66,451,000 pounds in 1951, would move by water if space were available, and to a great extent through the ports applicant proposes to serve. It appears, however, that the spread between the all-rail and the water-rail or water-truck rates in favor of the former rates may influence the movement in favor of the rail carriers at this time.

Although there is no shipper testimony concerning the lack of cargo space for lumber moving through the North Pacific to North Atlantic ports, there is sufficient evidence of a general nature consisting of orders of this Commission and reports of the Federal Maritime Board dealing with the lack of space for this commodity to support the conclusion that there is a need for additional cargo space from the Pacific coast ports Eureka and north thereof.

American-Hawaiian, Luckenbach, Pope & Talbot, and Arrow Line adduced evidence in opposition to applicant's proposed service. In support of their position they show low earnings or deficit operations for the period since World War II. They attribute the smaller volume of traffic available since World War II to the narrow spread between water and rail rates, accessorial charges paid on water shipments only, loss of shipper confidence on account of labor problems, growing self-sufficiency of the west coast and the narrowing of the area served by the ports because of the

higher level of the water-rail rates in comparison with the all-rail rates. They contend that their service, if not completely satisfactory since the start of the Korean War, will return to normal in the near future with the return of their ships leased to the Government and in other offshore services.

Attempts have been made by some of the protestants to add additional vessels to their intercoastal service during and since 1950. These ventures proved unsatisfactory from a revenue standpoint and the added ships were removed from the trade. Some of the protestants state that they are ready to increase the number of ships in this trade whenever they believe that the ships now in this service are not providing adequate cargo space. Since there appears to have been a substantial eastbound tonnage (general cargo, including lumber) available for the added ships during the period of their operation, it is apparent that the lack of westbound cargo had a material effect on the decision of the protestants to withdraw the added ships from the trade. Some of the protestants, however, showed a substantial amount of free cargo space eastbound during these months. During the period March through July, the service of the certificated carriers was adequate with the exception of service from the lumber ports Eureka and north thereof and except as noted in connection with specific ports mentioned above.

It is evident that the proposed service will not increase to any appreciable extent the volume of traffic moving in intercoastal service. If the proposed service is authorized, applicant would necessarily have to share some of the existing traffic with the certificated carriers. Although some of the latter carriers would suffer a loss of traffic, the shippers would gain a more frequent service or at least a greater amount of cargo space, for which they have shown there is a need during the period August through February. Although this Commission has recognized that a period following a war does not provide the standard of service from the standpoint of regularity or dependability of schedules that is ordinarily to be expected of common carriers, (See *Arrow Line Extension of Operations—Gulf Ports*, 265 I. C. C. 347) the evidence is convincing that the Korean

War is not a controlling factor with respect to the inadequacy of sevice furnished by the certificated carriers during the peak shipping season. In order to place more ships in the eastbound service during the period of heavy eastbound tonnage, there must be sufficient westbound tonnage to provide a return trip with a satisfactory revenue return. It is evident that the lack of westbound cargo was a major reason for the unprofitability of the increased service attempted by two of the protestants. Since the unbalance in eastbound and westbound volume of cargo will no doubt continue into the foreseeable future, any improvement in intercoastal service will have to be accomplished by service of the nature proposed by applicant.

The evidence is convincing that there is a need for applicant's proposed regular fortnightly service during the period August through February in the transportation of commodities generally, as well as its proposed irregular service, except that the ports of New Haven, Richmond, and Port Hueneme should be served without restriction as to time, the latter port to be served only as cargo is available and the irregular service from Eureka and ports north thereof should be confined to the transportation of lumber, wood pulp and wood flour only. Applicant's successful offshore operations in the past, together with other facts of record, show that it is fit, willing and able, financially and otherwise, properly to perform this service.

We find that the present and future public convenience and necessity require operation by applicant as a common carrier by water by self-propelled vessels (1) in regular fortnightly service in the transportation of passengers and commodities generally from the Pacific coast ports, except Richmond and Port Hueneme, designated in the appendix as regular ports, to all Atlantic coast ports named in the appendix, during the period August through February, (2) in regular fortnightly service in the transportation of passengers and commodities generally from Richmond and Port Hueneme to all Atlantic coast ports named in the appendix, (3) in regular fortnightly and irregular service in the transportation of passengers and commodities generally from all Pacific coast ports named in the appendix to New Haven, Conn., (4) in irregular service in the transpor-

tation of commodities generally from the ports in California south of Eureka designated as irregular ports in the appendix to all Atlantic coast ports named in the appendix, during the period August through February, and (5) in irregular service in the transportation of wood pulp, wood flour, and lumber from the Pacific coast ports named in the appendix, Eureka and north thereof, to all Atlantic coast ports named in the appendix; and that applicant is fit, willing, and able properly to perform such service and to conform to the provisions of part III of the act and the requirements, rules, and regulations prescribed by the Commission thereunder. The period August through February, as used in these findings, shall be construed to mean that no voyage may start from a Pacific coast port earlier than August 1 nor later than the last day of February of each shipping season. The application, except to the extent that it is herein granted, is denied.

An appropriate certificiate and order will be issued.

COMMISSIONER JOHNSON dissents.

APPENDIX

Regular and irregular ports from and to which applicant proposes to serve with names of carriers presently serving such ports

	Applicant's proposed Service	American Foreign Steamship Corporation	American Hawaiian Steamship Company	American President Lines, Ltd.	Calmar Steamship Corporation	Isthmian Steamship Company	Lockenbach Steamship Company, Inc.	Northland Transportation Company	Pope & Talbot, Inc.	States Steamship Company	United States Lines Company	Waterman Steamship Corporation	Weyerhaeuser Steamship Company
From Pacific coast ports													
Washington:													
Aberdeen	I	.....	(●)	.....	(●)	(●)	.....	.....	(●)	(●)	.....	(●)	(●)
Anacortes	I	.....	(●)	.....	(●)	(●)	.....	.....	(●)	.....	.....	(●)	(●)
Bellingham	I	(●)	(●)	.....	(●)	(●)	(●)	.....	(●)	(●)	.....	(●)	(●)
Bremerton	I	(●)	(●)	.....	(●)	(●)	(●)	.....	(●)	.....	.....	(●)	(●)
Everett	I	(●)	(●)	.....	(●)	(●)	(●)	(●)	(●)	(●)	.....	(●)	(●)
Grays Harbor	I	.....	(●)	.....	(●)	(●)	.....	.....	(●)	(●)	.....	(●)	(●)
Longview	I	.....	(●)	.....	(●)	(●)	.....	.....	(●)	(●)	.....	(●)	(●)
Seattle	I	(●)	(●)	.....	(●)	(●)	(●)	(●)	(●)	(●)	.....	(●)	(●)
Tacoma	I	(●)	(●)	.....	(●)	(●)	(●)	(●)	(●)	(●)	.....	(●)	(●)
Willapa	I	.....	.....	.....	(●)	(●)	.....	.....	(●)	.....	.....	(●)	(●)
Oregon:													
Astoria	I	.....	(*)	.....	(●)	(●)	(*)	.....	(●)	.....	.....	(●)	(●)
Coos Bay	I	.....	.....	.....	(●)	(●)	.....	.....	(●)	.....	.....	(●)	(●)
Newport	I	.....	.....	.....	(●)	(●)	.....	.....	(●)	.....	.....	(●)	(●)
Portland	I	.....	(*)	.....	(●)	(●)	(*)	(*)	(●)	(●)	.....	(●)	(●)
Yaquina Bay	I	.....	.....	.....	(●)	(●)	.....	.....	.....	.....	.....	(●)	.....
California:													
Eureka	I	.....	.....	.....	(*)	(*)	.....	.....	.....	.....	.....	.....	.....
Los Angeles	R	.....	(●)	(●)	.....	(*)	(●)	(*)	(●)	(●)	(*)	(●)	(●)
Long Beach	R	.....	(●)	(●)	.....	(*)	(●)	.....	(●)	(●)	.....	(●)	(●)
San Pedro	R	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	(●)
Port Hueneme [1]	R	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
San Diego	I	.....	(●)	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
San Francisco	R	.....	(●)	(*)	(*)	(●)	(●)	(●)	(●)	(●)	(*)	(●)	(●)
Alameda	R	.....	(●)	.....	(*)	(●)	(●)	(●)	(●)	(●)	.....	(●)	(●)
Berkley	R	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Oakland	R	.....	(●)	.....	(●)	(●)	(●)	(●)	(●)	(●)	.....	(●)	(●)
Richmond	R	.....	(●)	.....	(●)	(●)	(●)	(●)	(●)	(●)	.....	(●)	(●)
Sacramento	I	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Stockton	I	.....	(*)	.....	(*)	(●)	(●)	(*)	(*)	(*)	.....	(*)	(*)
To Atlantic coast ports													
Massachusetts:													
Boston	R	.....	(*)	(*)	(*)	(*)	(*)	(*)	(*)	.....	.....	(*)	(*)
Rhode Island:													
Providence	I	.....	(*)	.....	(*)	(*)	(*)	.....	(*)	.....	.....	(*)	.....
Connecticut:													
New London	I	(●)	(*)	.....	(*)	(*)	.....	.....	(*)	.....	.....	(*)	(*)
New Haven	R	(●)	(*)	.....	(*)	(*)	.....	.....	(*)	.....	.....	(*)	(*)
Bridgeport	I	(●)	(*)	.....	(*)	(*)	.....	.....	(*)	.....	.....	(*)	(*)
New York:													
New York Harbor	R	(*)	(*)	(*)	(*)	(*)	(*)	(*)	(*)	(*)	(*)	(*)	(*)
New Jersey:													
Jersey City	I	(●)	(●)	(●)	(●)	(●)	(●)	(●)	(●)	(●)	(●)	(●)	(●)
Newark	I	(●)	(●)	(●)	(●)	(●)	(●)	(●)	(●)	(●)	(●)	(●)	(●)
Camden	I	(●)	(●)	.....	(●)	(●)	(●)	(●)	(●)	(●)	.....	(●)	(●)
Pennsylvania:													
Philadelphia [2]	R	(*)	(●)	.....	(●)	(●)	(●)	(●)	(●)	(●)	.....	(●)	(●)
Chester	I	.....	(●)	.....	(●)	(●)	(●)	(●)	(●)	(●)	.....	(●)	(●)
Delaware:													
Wilmington	I	(*)	(*)	.....	(*)	(*)	.....	.....	(*)	(*)	.....	(*)	(*)
Maryland:													
Baltimore	R	(*)	(*)	.....	(*)	(*)	.....	(*)	(*)	(*)	(*)	(*)	(*)
Virginia:													
Newport News	R	.....	(●)	.....	(●)	(●)	.....	.....	(●)	(●)	.....	(●)	(●)
Norfolk	R	.....	(●)	.....	(●)	(●)	.....	(●)	(●)	(●)	.....	(●)	(●)

I Irregular ports.
R Regular ports.
[1] Subject to cargo.
[2] Includes Philadelphia Harbor as described in Ex Parte No. 145.

APPENDIX C

Excerpt from Luckenbach's Petition for Reconsideration, raising the issue of the National Defense factor under the National Transportation Policy.

A very important contribution of the intercoastal fleet to the national defense is that the coastwise and intercoastal fleets are in home waters and, in the event of an emergency, are readily available for Government service. On the other hand, a substantial portion of the foreign-trade fleet must necessarily be deployed throughout the world, subject to capture by enemy forces, delay in friendly or neutral ports, or attrition on the high seas. As stated by the late Secretary Forrestal:

> "Tonnage engaged in coastwise and intercoastal trades is of particular significance from the aspect of national defense. In the event of an emergency such shipping constitutes a ready reserve for a utilization in the immediate solution of such logistics tasks as may require prompt and decisive accomplishment. The nature of the trade makes such tonnage peculiarly important, since there exists neither any danger of internment, nor any lengthy delay in their availability for emergency service" *Hearings, Senate Committtee on Interstate and Foreign Commerce,* S. Res. 50, Part 6, p. 1139.

The utilization by Isbrandtsen of domestic operating rights as a segment of a long-haul foreign-trade operation eliminates one of the basic defense objectives of the intercoastal trade—namely, to maintain in home water sufficient available tonnage in the event of an emergency. To substitute for vessels devoted to the intercoastal trade, vessels which are operating as only a segment of a long-haul operation would be a radical departure from the basic defense objectives of the National Transportation Policy.

In the United States District Court for the Southern District of New York

Civil Action No. 90–130

LUCKENBACH STEAMSHIP COMPANY, INC.,
APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

MOTION TO AFFIRM

Pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

This is a direct appeal from a final judgment entered January 29, 1954, by a three-judge district court convened pursuant to 28 U. S. C. 2284, 2325, dismissing a complaint seeking to set aside a Commission order. The order granted intervenor Isbrandtsen Company a certificate of public convenience and necessity authorizing it to engage in eastbound intercoastal trade from Pacific Coast ports to Atlantic Coast ports. Appellant is one of the principal water carriers now certificated in the intercoastal trade. The appeal was al-

lowed on March 22, 1954, and appeal papers were served upon appellees on March 23, 1954.

The pertinent findings of Division 4 of the Commission (made after full administrative proceedings)—upon which it based its ultimate findings that the present and future public convenience and necessity require Isbrandtsen's certification, and that Isbrandtsen is fit, willing, and able to perform the service—are as follows:

Since 1950, there has been a demand by Pacific Coast shippers for more frequent intercoastal sailings and greater cargo space, particularly during certain peak periods, as well as for service from and to ports not served by existing intercoastal carriers. 285 I. C. C. 378. The number of sailings from Pacific Coast ports to New York (which receives more than half the traffic moving to North Atlantic ports) decreased from 1951 to 1952. P. 374. Attempts by some of the existing intercoastal carriers to increase their service since 1950 were unprofitable, and the additional ships were removed from the trade. P. 378. A "major reason" for the failure of these attempts was the lack of westbound cargo, since "[i]n order to place more ships in the eastbound service during the period of heavy eastbound tonnage, there must be sufficient westbound tonnage to provide a return trip with a satisfactory revenue return." *Ibid.*

Since the imbalance in eastbound and westbound cargo will "continue into the foreseeable

future, any improvement in intercoastal service will have to be accomplished by service of the nature proposed by applicant [Isbrandtsen]." *Ibid.* Isbrandtsen is principally engaged in fortnightly around-the-world sailings from Atlantic Coast ports, and has cargo space available on the last leg of such trips, which is from the West Coast through the Panama Canal to the East Coast. Pp. 370, 372. Although some of the existing intercoastal carriers would suffer a loss of traffic if Isbrandtsen is certificated, "the shippers would gain a more frequent service or at least a greater amount of cargo space, for which they have shown there is a need * * *." P. 378.

The certificate issued to Isbrandtsen authorizes it to provide regular and irregular service from designated West Coast ports to designated East Coast ports, restricted in certain instances as to the months during which service may be rendered, and the commodities which may be carried. P. 379.

A petition for reconsideration was denied by the full Commission, and the district court, in a well-reasoned opinion by Judge Augustus Hand, unanimously sustained the order.

Appellant concedes that the Commission made the necessary "basic" findings and that its report "presents an intelligible and rational basis for its decision." Its principal contention is that the Commission failed to comply with section 8 (b) of the Administrative Procedure Act. 5 U. S. C.

1007, which requires agency decisions to include a statement of "findings and conclusions as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record." Specifically, appellant argues that the Commission failed to rule upon the contention that certification of Isbrandtsen would contravene the National Transportation Policy set forth in the Interstate Commerce Act.

We submit, however, that the Commission's report fully meets the standards of section 8 (b) of the Administrative Procedure Act, and shows that the Commission considered and rejected appellant's contentions under the National Transportation Policy, insofar as they were material to the issues before it.

The substantive standards governing the issuance of certificates of public convenience and necessity to water carriers are set forth in section 309 (c) of the Act. That section directs the Commission to issue a certificate if it finds that there is a present or future public convenience and necessity for the proposed service, and that an applicant is fit, willing, and able to perform it. The National Transportation Policy, which is the preamble to the Act, does not impose any additional substantive requirements for the issuance of such certificates, but merely enunciates general policy criteria which the Commission is to apply in administering *all* sections of the Act.

In other words, in determining what the public convenience and necessity is, and whether an applicant is fit, willing, and able to perform the service, the Commission is to give effect to the basic National Transportation Policy. *United States* v. *Great Northern R. Co.*, 343 U. S. 562, 576; *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 82–84.

Appellant argues that, because Isbrandtsen is engaged in unregulated international operations, it will be able to offer more attractive terms for the intercoastal service—rendered on the last leg of its around-the-world operations—than appellant. Such commingling of unregulated international service with regulated intercoastal service, appellant contends, would create an "unprecedented opportunity for unfair competition" which would "seriously endanger or impair" the continued operation" of the existing intercoastal carriers, and would contravene the National Transportation Policy against "unfair or destructive competitive practices."

But it was precisely because of Isbrandtsen's unique around-the-world operation, and its ability to render eastbound intercoastal service without being dependent upon a return westbound trip, that the Commission granted the certificate. For the Commission found that, due to the unbalance of eastbound and westbound traffic, only a carrier in Isbrandtsen's position could provide the addi-

tional eastbound intercoastal service for which there was a strong public demand, and which the existing intercoastal carriers are unable to meet. Indeed, in another case decided the day before the instant case, the Commission found it necessary to deny an application for a certificate to engage in both eastbound and westbound intercoastal service, on the ground that there was no need for the westbound service, and that the carrier had not shown that it could operate profitably in the eastbound trade alone. *West Coast Trans-Oceanic Steamship Line Common Carrier Application,* 285 I. C. C. 381 (Sept. 9, 1953).[1]

Thus, by determining that Isbrandtsen's international operations qualified it to render the eastbound intercoastal service, the Commission clearly rejected appellant's conjectural contention that Isbrandtsen's certification would create any danger of unfair competition.[2] The Administrative

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[1] Appellant argues that statements in the *West Coast* case are in conflict with those in the instant case, and that the Commission's failure to explain the contradictions was "arbitrary and capricious." As noted in the text, however, the two cases clearly are distinguishable. As the district court pointed out, mere extraction of "phrases from that order and attaching undue significance to them," without considering the report of the Commission as a whole, does not establish inconsistency.

[2] All certificated carriers are required by the Act to observe just and reasonable rates, regulations, and practices (section 305), and the Commission has adequate power to require them to do so (section 307 (b)). If Isbrandtsen should ever engage in unfair competitive practices, appellant can

Procedure Act does not require the Commission specifically to refer to or to discuss contentions made under the National Transportation Policy where, as here, the ultimate decision shows that the Commission considered and rejected those contentions.

Appellant further contends that the Commission failed to consider its contention that certification of Isbrandtsen would contravene the National Transportation Policy of developing a transportation system adequate to meet the needs of the national defense. It argues that carriers engaged exclusively in intercoastal operations will always have their ships in waters adjacent to the United States, whereas the ships of an international carrier may, in time of emergency, be unavailable because in foreign waters. This contention—made for the first time on petition for rehearing, cf. *Wales* v. *United States,* 108 F. Supp. 928 (N. D. Tex.), affirmed, 345 U. S. 954—would be pertinent if the issue before the Commission were to choose between an intercoastal

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always file a complaint with the Commission (section 307 (a)).

Appellant further argues that the Commission erred in excluding evidence of Isbrandtsen's alleged "rate cutting" in foreign commerce. We submit that the examiner correctly held that this evidence was irrelevant to the issues in this proceeding. Isbrandtsen's rate practices in its unregulated foreign operations obviously are not pertinent in determining whether it should be certificated for intercoastal operations which, as noted, are subject to complete Commission regulation.

and an international carrier. But it is immaterial where, as here, the Commission found that none of the existing intercoastal carriers could render the proposed service, and the only issue was whether to provide such needed service by certificating Isbrandtsen, or to deny it entirely by refusing the certificate.[3]

Finally, appellant contends that the Commission failed to consider the effect that certification of Isbrandtsen would have on existing carriers. The Commission, however, weighted the benefits which the additional service would provide to the shippers against the losses to existing carriers, and concluded that the public interest requires certification. It recognized that such certification would result in a loss of traffic to some of the existing carriers, but pointed out that "the shippers would gain a more frequent service or at

---

[3] *Cantlay & Tanzola, Inc.* v. *United States*, 115 F. Supp. 72 (S. D. Cal.), upon which appellant relies, is clearly distinguishable. There the Commission had authorized, as just and reasonable, a 40% reduction in rail rates for petroleum—a reduction which would have driven competing rail and pipeline carriers out of the trade. The district court set the order aside on the ground that the Commission had erred in failing to make a finding on the competing carriers' contention that it was contrary to national defense policy to rely exclusively on the railroads for transporting oil. Thus, in that case the effect of the new rates on national defense was material to the issue of whether they were just and reasonable, since the lower rates would eliminate competing carriers. In the instant case, however, appellant's national-defense argument is immaterial, since certification of Isbrandtsen would add another carrier to the trade.

least a greater amount of cargo space, for which they have shown there is a need * * *." 285 I. C. C. at 378. The balancing of such competing considerations to determine where the public interest lies is peculiarly a matter for the Commission's expert judgment. *United States* v. *Detroit Navigation Co.*, 326 U. S. 236, 241; *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60, 65.[4]

CONCLUSION

For the foregoing reasons, we submit that the decision below is clearly correct and that this appeal presents no substantial question. The judgment of the district court should accordingly be affirmed.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

EDWARD M. REIDY,
Chief Counsel,
Interstate Commerce Commission.

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[4] Cf. *Newtex Steamship Corp.* v. *United States*, 107 F. Supp. 388 (S. D. N. Y.), affirmed, 344 U. S. 901, where the court affirmed a Commission order which amended a certificate to authorize additional intercoastal service, against the objection that permitting such additional service would endanger the operations of competing carriers.

U. S. GOVERNMENT PRINTING OFFICE: 1954

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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 90-130

LUCKENBACH STEAMSHIP COMPANY, INC.,
Plaintiff,

against

THE UNITED STATES OF AMERICA, ET AL.,
Defendants

MOTION TO AFFIRM ON BEHALF OF NEW HAVEN CHAMBER OF COMMERCE

Introductory Statement

1. *Proceedings Below*

On December 3, 1951, Isbrandtsen Company, Inc. filed an application with the Interstate Commerce Commission for a certificate of public convenience and necessity to serve in intercoastal traffic as a common carrier by water, from Pacific coast ports to North Atlantic ports via the Panama Canal in a one-way eastbound operation. Evidence was taken at hearings before a Commission Examiner who issued a recommended report and order granting the application. The Commission, Division 4, sitting with three Commissioners, one dissenting, held that public convenience and necessity required the issuance of the certificate. The

entire Commission denied Plaintiff's application for rehearing and reconsideration and affirmed the decision of Division 4. Plaintiff instituted action in the District Court for the Southern District of New York to enjoin and set aside the decision and order of the Commission. The District Court issued its decision dismissing the complaint and dissolving the stay. On January 29, 1954, final judgment was entered, which judgment is appealed by Plaintiff to this Court. Pursuant to Rule 12, Paragraph 3 and Rule 7, Paragraph 4 of the Rules of the Supreme Court of the United States, this motion to affirm is made on the basis that the questions presented by Plaintiff's appeal are so unsubstantial as not to require further argument.

Preliminary Statement

I. *Interest of Intervenor*

Intervenor, New Haven Chamber of Commerce, appeared in this action in support of the applicant Isbrandtsen before the Interstate Commerce Commission. This Intervenor introduced testimony before the Interstate Commerce Commission with respect to the need for intercoastal steamship service from west coast ports to the port of New Haven. The interest of Intervenor is wholly and solely with respect to shippers and receivers of freight using the port of New Haven for distribution to points in Connecticut and western Massachusetts. This Intervenor has no private interest in either applicant Isbrandtsen or protestant Luckenbach as such, nor has it any self serving financial interest in either protestant or applicant. The interest of this Intervenor is that of public interest as contrasting to the private interests of existing carriers.

The New Haven Chamber of Commerce sought service to the port of New Haven and, motivated by that need it supported the application of the Isbrandtsen Lines which

offered to provide such service subject, necessarily, to obtaining authority from the Interstate Commerce Commission.

II. *Interstate Commerce Commission's Findings and Decision*

The Commission found from the evidence presented before it that the port of New Haven does not presently have any intercoastal carrier service although shippers have sought such service and requested the same from the Plaintiff.

The Plaintiff opposes the application of Isbrandtsen while refusing to serve the port of New Haven and shippers in the area which the port of New Haven serves as a distribution area, namely, the State of Connecticut and Western Massachusetts.

> (a) "More than 30 witnesses representing shippers, chambers of commerce, port organizations, and other interests testified in behalf of the proposed service. With the exception of a witness for the National Wool Growers Association and the National Wool Marketing Corporation, a witness for a manufacturer of electrical equipment and one for a manufacturer of washing compounds, the shipper witnesses represented packers and distributors of canned vegetables and fruits and other food products produced on the Pacific coast, princially in the State of California. In addition to the interested shippers, there appeared terminal companies, chambers of commerce, and other organizations in support of the establishment of the proposed service at the Port of Richmond and Port Hueneme on the Pacific coast and the Port of New Haven on the Atlantic coast * * *" (Commission's Decision Page 374-5).
>
> (b) "The port of New Haven presently is not served by intercoastal carriers although shippers have asked for this type of service. There is a large area tributary to the port that would benefit from the proposed service

in the form of lower transportation costs, the port having adequate facilities that could be used for this purpose. Several shippers, as well as various port and other organizations, support the establishment of this service. Applicant's estimate that approximately 1,500 tons per vessel would move through this port is supported by the evidence adduced by the interested shippers. This tonnage is presently moving through the ports of New York and Boston" (Commission's Decision Page 375).

Concerning Plaintiff's claim that the port of New Haven is adequately served through the ports of New York and Boston, the Commission found:

(c) "The protestants oppose applicant's proposed service to the port of New Haven on the ground that the shippers and receivers of freight are now adequately served through the ports of New York and Boston, and that no additional traffic is being added. In *Pan-Atlantic S. S. Corp. Extension—Houston,* 285 I. C. C. 33, 48-49, division 4 said:

> We are constrained, also, to agree that shippers at or adjacent to ports other than New York are entitled to service through the ports to which they are logically tributary, if such service is economically feasible.
>
> The volume of cargo shippers indicate would be available removes any doubt concerning the question of whether the service would be economically feasible. Although the proposed service would divert traffic from the certificated carriers, serving New York and Boston, such diversion, there being no other reason, should not deprive the port of New Haven of a new and improved service" (Commission's Decision Page 375-6).

The Commission also gave consideration to the effect upon existing carriers of the issuance of a certificate to Isbrandtsen to service the port of New Haven as weighed

against the public interest of the shipping and receiving public. It found a need for service of east bound tonnage and that based upon the evidence in the record such need for east bound service could be met by the granting of the certificate to Isbrandtsen, due to the nature of its world-wide service.

> (d) "* * * Since there appears to have been a substantial eastbound tonnage (general cargo, including lumber) available for the added ships during the period of their operation, it is apparent that the lack of westbound cargo has a material effect on the decision of the protestants to withdraw the added ships from the trade * * *" (Commission's Decision Page 378).
>
> (e) "It is evident that the proposed service will not increase to any appreciable extent the volume of traffic moving in intercoastal service. If the proposed service is authorized, applicant would necessarily have to share some of the existing traffic with the certificated carriers. Although some of the latter carriers would suffer a loss of traffic, the shippers would gain a more frequent service or at least a greater amount of cargo space, for which they have shown there is a need during the period August through February * * *" (Commission's Decision Page 378).
>
> (f) "* * * Since the unbalance in eastbound and westbound volume of cargo will no doubt continue into the foreseeable future, any improvement in intercoastal service will have to be accomplished by service of the nature proposed by applicant" (Commission's Decision Page 378).

III. *Decision of Court Below*

1. The Court below, in a decision written by Augustus N. Hand, Circuit Judge, reviewed the findings of the Commission and after a complete discussion of the issues raised by the Plaintiff against the validity of the Commission's

order, held that the Commission had made the essential and ultimate findings required by law. The Court held:

> "• • • The ultimate findings required by law are only that the applicant is fit, willing and able to perform the proposed service and that the service will serve the public convenience and necessity, 49 U. S. C. 909(c). Such findings were made here • • •" (Decision of Court below, Page 4).
>
> "• • • However it seems equally clear that the Commission can not and should not be required to discuss each consideration expressed in the National Transportation Policy in every decision it renders. '(T)he basic findings essential to the validity of a given order will vary with the statutory authority invoked and the context of the situaiton presented.' Alabama Great Southern R. Co. v. United States, 340 U. S. 216, 288. It is only necessary that the essential basis of the Commission's order appear in the report so that a court can satisfy itself that the Commission has performed its function • • •" (Decision of Court below, Page 5).

IV. *Questions Presented*

The Plaintiff in this action concedes that "The report of the Interstate Commerce Commission appears reasonable and intelligible on its face. It is not Luckenbach's position that the Commission failed to make findings of fact or that it failed to give rational reasons for its action" (Statement as to Jurisdiction, Page 2).

Again, at Page 16 of the Statement of Jurisdiction:

> "Nor is this a case in which the Commission does not sufficiently explain the basis of its action. We agree that within its four corners the Commission's report presents an intelligible and rational basis for its decision. • • •"

Plaintiff claims, however, that the Interstate Commerce Commission committed an error in failing to comply with

the requirements of Section 8(b) of the Administrative Procedure Act, and that the Commission, pursuant to the requirements of Section 8(b), failed to give its "reasons or basis—upon all the material issues of fact, law or discretion presented on the record".

In particular, Plaintiff alleges error of the Interstate Commerce Commission in (A) excluding evidence of rate cutting practices by an applicant for a certificate of public convenience and necessity, (B) arbitrary and capricious action by the Commission based on an alleged inconsistency by the Commission in its decision in West Coast Trans-Oceanic Steamship Line, 285 I. C. C. 381 decided one day before the instant case, and (C) in failure to make a specific finding as to the issue of national defense pursuant to the National Transportation Policy of the Interstate Commerce Act.

It it well established by numerous precedents and decisions of the courts that a decision of the Commission will be sustained by the courts if it is found that there is substantial evidence in the record for the findings of the Commission; and if it is further found that the Commission has made the basic findings of fact required by the statute. The Commission is not required to make atomized and detailed findings of fact upon each and every issue claimed by the parties to the proceedings before it. It is charged only with making basic findings essential to the validity of a given order. Here, the Commission found that public convenience and necessity required the institution of service by the Isbrandtsen Lines.

(A) Rates Not in Issue

The Plaintiff attacks the order of the Commission, claiming that the Commission's report did not contain a statement upon the material issue of "the threat of unfair com-

petition inherent in the proposed service of Isbrandtsen". They further claim that "Luckenbach sought to prove that Isbrandtsen has and would cut rates, but the Commission excluded such testimony without giving any reason" (Statement as to Jurisdiction, Page 9).

In deciding whether public convenience and necessity require the proposed operation, the question of rates is not in issue. The remedy, if any be needed, for the alleged condition is provided for in the Act (U. S. Code Title 49, Section 907).

The issue involved before the Commission was the need and convenience of the shipping public for intercoastal east bound water service. The applicant is not called upon, and cannot establish any rates for this service until its certificate is issued. Once the certificate is issued, it is bound by statute to publish and file a tariff setting forth its specific rates and charges (U. S. Code Title 49, Section 905).

These rates and charges must meet the standards set up by the Act which provides the method of relief in a proper proceeding brought before the Commission in the event of complaint concerning such charges; either as being unduly low, or unreasonably high. The Commission, in a proceeding involving public convenience and necessity, cannot assume that the rates of competing carriers are those which the Commission might approve, nor that the proposed rates of applicant, which rates have not been published and are not effective, do not meet the required standards.

Atlanta-New Orleans Motor Freight Co. et al. v. *United States of America, et al.*, 10 F. C. C. 2085 at 2087; *Northern District of Georgia, Atlanta Division*, 1953:

> "• • • It is quite true, as complainants contend, that if the only complaint that the shippers (certain textile mills) had as to existing services concerned the matter of rates, there was available to them an administrative remedy whereby they could seek a change in such rates

(see Interstate Commerce Act, Part II, Sec. 216(g), 49 United States Code, 316(g)."

Coyle Lines Incorporated, et al. v. *United States of America, et al.*, 115 F. Supp. 272 at 278:

"• • • The railroads' argument is predicated on the assumption that the only reason the Commission granted the new certificate was to keep Gulf-Canal in an unprofitable business which competes with the railroads. As shown above, the Commission found a need for a water carrier which would provide less than bargeload as well as bargeload service along the Intracoastal Canal and that Gulf-Canal's proposed service would meet this need. If the railroads feel that Gulf-Canal or any other water carrier is angling its rates to operate at a loss where competition with railroads exists, the matter can be brought to the attention of the Commission in a proper proceeding."

Refering to the claim of unfair competitive practices by Isbrandtsen because it is engaged in unregulated foreign trade, the Court found in the instant case:

"• • • There is no evidence to show that this has resulted in unfair competitive practices. Thus, where the issue raised does not seem of manifest importance and the Commission has indicated that it has considered it, we do not think it wise or necessary to protract the litigation further by remanding the order for more explicit and seemingly useless discussion" (Decision of Court below, Page 8).

(B) *The Requirements of the Administrative Procedure Act Have Been Met in the Commission's Findings*

It is not necessary for the Commission to make a detailed atomized finding as to each and every incidental phase of the proceeding before it, or as to each and every objection raised by protestant. If the Commission has made the basic

findings required by the Act, it has met the requirements of the Administrative Procedure Act.

This principle has been determined by numerous decisions of the Courts. In *Coyle Lines Incorporated, et al.* v. *United States of America* cited *supra*, at Pages 275, 276:

> "Section 10(e) of the Administrative Procedure Act relating to judicial review of administrative agency actions provides that the reviewing court shall 'hold unlawful and set aside agency action, findings and conclusions found to be * * * (5) unsupported by substantial evidence * * * In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party * * *.' * * *"

The District Court, citing the Supreme Court in *Universal Camera Corporation* v. *Labor Board*, 340 U. S. 474, 488, then stated:

> "It is now clear, therefore, that orders of administrative agencies are to be enforced only when such orders have a rational basis in adequate findings which are supported by substantial evidence on the record considered as a whole. It is further true, however, that the court may not substitute its judgment for the judgment of the agency which, under the law, is presumably equipped by experience to deal with matters coming within the orbit of its expertise. A court exceeds its function when it attempts to weigh the evidence or to determine the credibility of the witnesses. The court's function is at an end when it determines that the findings of the agency are, or are not, supported by substantial evidence on the record considered as a whole.
>
> Plaintiffs first make the contention that the Commission has made insufficient findings on which to predicate its ultimate conclusion, as required by accepted standards of judicial and quasi-judicial procedure and specifically by the Administrative Procedure Act. Sec-

tion 8(b) of the Administrative Procedure Act, 5 U. S. C. A. Sec. 1007(b), requires that in agency proceedings such as the one now under review 'All decisions • • • shall • • • include a statement of (1) findings and conclusions as well as the reasons or basis therefor, upon all material issues of fact, law, or discretion presented on the record • • •.'

The Commission here made its ultimate or quasi-judicial findings in the terms of the Act which authorizes issuance of a certificate of public convenience and necessity when it is found 'that the applicant is fit, willing and able to perform the service proposed • • • and that the proposed service is or will be required by the present or future public convenience and necessity.' 49 U. S. C. A. Sec. 909(c). In addition, the Commission, Division Four, filed a lengthy opinion setting out the facts in detail as well as the considerations which led to its ultimate conclusion. • • •

From these findings and the evidence which supports them it is clear that 'Enough has been 'put of record' to enable us to perform the limited task which is ours.' *Alabama Great Southern Railroad Co., et al., v. United States,* 340 U. S. 216 • • •. Section 8(b) of the Administrative Procedure Act does not require detailed or numbered findings of every subsidiary evidentiary fact. • • •"

(C)—*National Defense — Affirmative Finding in Instant Proceeding Not Essential to Validity of Commission's Order.*

Judge Augustus N. Hand stated in the decision of the lower court:

"In contrast the record here discloses that the issue of national defense was not raised below. Nor is it clear that there is any substantial interest of national defense involved or violated. The need for the proposed service was established and in the 'context of the situation presented' we do not think an affirmative

discussion of national defense was necessary to validate the order."

(Decision of Court below, Page 6)

The case relied on by the Plaintiff is *Cantley & Tanzola, Inc. v. United States,* 115 F. Supp. 72, (S. D. Cal.). It does not necessarily follow that in each case presented before the Commission a substantial interest of national defense is involved. In the Cantley & Tanzola, Inc. case "the context of the situation presented" specifically raised a primary issue to the question of national defense. The case did not involve the issuance of a certificate based on proof of public convenience and necessity. It did involve reduced rates proposed by railroads to block efforts to construct a petroleum pipe line. It was claimed that the lower rates, if allowed to go into effect, would be so destructive as to eliminate motor carriers, and result in railroads being the only carrier to remain in the field. The issue of preserving motor and rail carriers was directly in issue. In Cantley & Tanzola, Inc. cited supra, the Court stated, (Page 80)

"• • • Expert knowledge of transportation problems is not required to envisage the probable desirability of having at least one alternative method of transporting the 'large surplus' of Texas oil to the Pacific coast to serve urgent, possibly vital, needs of national defense."

In the present case, no issue of complete elimination of any one type of carrier is involved. There was a claim of diversion of traffic from one water carrier to another, and the Commission passed properly upon the issue of such diversion and effect of such diversion on the existing water carriers, including the Plaintiff.

(D)—*There Is No Inconsistency in the Commission's Decision in the Isbrandtsen Case with the Decision in the West Coast Trans-Oceanic Case.*

The Plaintiff attacks the order of the Commission claiming that "the Commission's order was arbitrary and capricious in that it contained manifest inconsistencies when compared with the companion case (West Coast Trans-Oceanic Steamship Line, Common Carrier Application I. C. C. Docket No. W-1019)".

The order of the Commission in the West Coast Trans-Oceanic Steamship Line case was not inconsistent, and was based on an entirely different set of facts and presented an entirely different issue. As found by the lower court:

> "East coast applied for a certificate for intercoastal traffic generally, but the Commission, finding no need for additional west bound tonnage, denied the application because it was not shown that West Coast could operate profitably in east bound trade alone." (Decision of Court below, Page 8)

In Coyle Lines Incorporated v. United States cited supra, the Court stated: (Page 278)

> "• • • Plaintiffs contend that the Commission's decision in the Commercial Barge Lines case leaves no doubt that the Commission's purpose in giving Gulf-Canal authority to operate in barge-load quantities was to support the economically unfeasible less than barge-load service now being offered by Gulf-Canal under its existing certificate."
>
> "• • • It may be that the findings of the Commission in the case at bar appear inconsistent with its findings in the *Commercial Barge Lines case.* However, as said by Mr. Justice Brandeis in *Virginian Railroad v. United States,* 272 U. S. 658, 666, 'This court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclu-

> sion or with the alleged inconsistency with findings made in other proceedings before it.' So long as there is substantial evidence in this record taken as a whole to support the conclusion that the public convenience and necessity require the issuance of a certificate to Gulf-Canal covering less than bargeload as well as bargeload quantities, no further inquiry need or should be made. We have examined the record as a whole and we find substantial evidence to support the Commission's action."

There is, however, no inconsistency in the Commission's order in the instant case; for, as held by the District Court in this action when referring to Plaintiff's contention of inconsistency in the West Coast Trans-Oceanic case, "An attempt is made to prove this by extracting phrases from that order and attaching undue significance to them, but a report of the Commission must be read as a whole. • • • The position of Isbrandtsen is clearly distinguishable in view of its proposal to use its ships now in round the world trade to carry on the eastbound service." (Decision of Court below, Pages 8-9)

Conclusion

The decision of the Commission indicates on its face that the Commission did consider each and every issue presented. The Commission stated: "We have heard the parties in oral argument. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified." The Commission is not required to make detailed and atomized findings of each and every collateral issue raised.

The Commission, having made its ultimate findings required by law, within the context of the situation presented, that (a) the Applicant is fit, willing and able to per-

form the proposed service, (b) that the service will serve the public convenience and necessity, and

Having set forth the basis on which it arrived at its conclusion, and

Having given consideration to all issues presented before it,

It is respectfully claimed that the Commission's order is valid.

For the reasons herein stated, we respectfully believe that the questions represented by Plaintiff's appeal are so unsubstantial as not to require further argument, and respectfully pray that the appeal of the Plaintiff be dismissed and that the decree and judgment of the District Court be affirmed.

Respectfully submitted,

PAUL J. GOLDSTEIN,
ROBERT L. WRIGHT,
Attorneys for New Haven Chamber of Commerce.

April 5, 1954.

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APR 13 1954
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 685

LUCKENBACH STEAMSHIP COMPANY, INC.,
Appellant,

against

UNITED STATES OF AMERICA, ET AL.

STATEMENT BY APPELLEE, PARR RICHMOND TERMINAL CO., INTERVENOR, IN SUPPORT OF ISBRANDTSEN CO., INC., MOTION TO AFFIRM

By an order heretofore entered herein, Parr Richmond Terminal Co. was granted leave to intervene herein because of the public interest of Port Richmond, San Francisco Bay.

Intervenor is a corporation engaged as operator of the Port Richmond, California, terminal facilities. As such it operates docks, wharves and other terminal structures under a lease with the City of Richmond, as owner, which lease imposes upon intervenor the burden of conducting the said terminal facilities for the best interests of commerce and the public of Port of Richmond.

The facilities include four separate terminals efficiently located on the waterfront with 5,350 feet of berthing space for large deep draft vessels on a government maintained

channel of 32 foot depth at average stages of the tide These facilities are equipped with modern docks and sheds with complete terminal facilities for carloading and unloading and dockside cranes for heavy lifts and facilities for the handling of bulk cargoes of all kinds ranging from case goods to locomotives.

It will be noted from the map of the area attached thereto that the Port of Richmond is on the east side of San Francisco Bay directly opposite the Golden Gate and serves without transshipment, the fruit, agricultural and manufactured production and shipping from the Alameda, Contracosta, Salerno, Napok and Sonoma Valleys, which include the major cities of Stockton and Sacramento.

Heretofore service to the Port of Richmond has been inadequate. The granting of the certificate of additional service to the Isbrandtsen Company by the Commission which was sustained in the District Court has opened the way for adequate, regular and dependable intercoastal service from Port Richmond, which the public interest of Port Richmond requires. Any reversal of the decision of the Interstate Commerce Commission or of the District Court in this case would be to deprive the Port of Richmond of that benefit.

The Commission's findings are supported by substantial evidence and establish the public need for the extra intercoastal service to Port Richmond and should be sustained here.

It is respectfully submitted that the judgment of the District Court should be sustained and the motion herein to affirm should be granted.

Dated: April 5, 1954.

Respectfully submitted,

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FILED
APR 13 1954
HAROLD B. WILLEY, C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 685

LUCKENBACH STEAMSHIP COMPANY, INC.,
Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ISBRANDTSEN COMPANY, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM ON BEHALF OF ISBRANDTSEN COMPANY, INC., APPELLEE

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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 90-130

LUCKENBACH STEAMSHIP COMPANY, INC.,
Plaintiff-Appellant,

against

THE UNITED STATES OF AMERICA, ET AL.,
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM ON BEHALF OF ISBRANDTSEN COMPANY, INC., DEFENDANT-APPELLEE

On March 22, 1954, the District Court for the Southern District of New York granted the Luckenbach Steamship Company, Inc. permission to appeal to the Supreme Court of the United States from an order of said court dated January 29, 1954, which dismissed an action by Luckenbach Steamship Company to enjoin an order of the Interstate Commerce Commission granting an intercoastal certificate of public convenience and necessity to the Isbrandtsen Company. This motion to affirm, on the ground that the questions presented by such appeal are so insubstantial as not to

need further argument, is made pursuant to Paragraph 3 of Rule 12 and Paragraph 3 of Rule 7 of the Rules of the Supreme Court of the United States.

I. Jurisdiction

This appeal is taken from the judgment of a 3-judge district court, convened pursuant to 28 U. S. C. §§ 2325 and 2284. The Supreme Court is granted jurisdiction to review the judgment by 28 U. S. C. § 1253.

II. Question Presented

Whether a substantial question, warranting review by this Court, is raised by the lower Court's decision which approved an intercoastal certification order of the Interstate Commerce Commission and rejected as insubstantial the claim that the Commission had failed to pass on issues material to its decision.

III. Statutes Involved

1. Section 309(c) Interstate Commerce Act, 49 U. S. C. 909(c):

> "Subject to section 310 [not here applicable], upon application as provided in this section the Commission shall issue a certificate to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if the Commission finds that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules and regulations of the Commission thereunder, and that the proposed service, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied."

2. National Transportation Policy, Interstate Commerce Act, 49 U. S. C. A. Note preceding Section 1:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

3. Section 8(b) Administrative Procedure Act, 5 U. S. C. 1007(b) (in pertinent part):

"All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) *findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record;* and (2) the appropriate rule, order, sanction, relief or denial thereof."

IV. Statement of the Case

The Administrative Proceedings

On December 3, 1951, Isbrandtsen Company, Inc. (Isbrandtsen), Intervenor-Defendant below, filed an application with the Interstate Commerce Commission (Commis-

sion) for a certificate of public convenience and necessity to serve the eastbound intercoastal trade from ports on the Pacific Coast to ports on the Atlantic Coast under Section 309(c) of the Interstate Commerce Act.

Extensive hearings before a Commission Examiner were held in New York, New York, Washington, D. C., and San Francisco, California. At these hearings testimony of the more than 30 independent, non-carrier witnesses representing shippers, chambers of commerce, port organizations and other non-carrier interests, was without exception to the point that the existing service was inadequate to meet the needs of east-bound traffic and that there was a necessity for additional service. In substance, the testimony conclusively established the urgent public need for additional eastbound service, particularly during the peak season months of August through September. These independent witnesses were unanimous in supporting the application for the proposed Isbrandtsen service. Even the single non-carrier Luckenbach witness, who appeared in behalf of the Port of New York Authority, testified that at least a 50 percent increase in existing service eastbound was needed.

The Administrative Findings and Decision

On the basis of the evidentiary complex thus developed on the record, the Commission made the following findings (*Isbrandtsen Co., Inc., Common Carrier Application*, 285 I. C. C. 369, 378, 379):

> 1. "The evidence is convincing that there is need for applicant's proposed regular fortnightly service during the period August through February in the transportation of commodities generally.
>
> 2. "The evidence is convincing that the Korean war is not a controlling factor with respect to inadequacy of service furnished by the certificated carriers during the peak season.

3. "In order to place more ships in the eastbound service during the period of heavy eastbound tonnage, there must be sufficient westbound tonnage to provide a return trip with a satisfactory revenue return. It is evident that the lack of westbound cargo was a major reason for the unprofitability of increased service attempted by two of the protestants. Since there appears to have been a substantial eastbound tonnage (general cargo, including lumber) available for the added ships during the period of their operations, it is apparent that lack of westbound cargo had a material effect on the decision of the protestants to withdraw the added ships from the trade. . .

"Since the unbalance in eastbound and westbound volume of cargo will undoubtedly continue into the foreseeable future, any improvement in intercoastal service will have to be accomplished by service of the nature proposed by applicant" (i. e., eastbound service only).

4. "It is evident that the proposed service will not increase to any appreciable extent the volume of traffic moving in intercoastal service. If the proposed service is authorized, applicant would necessarily have to share some of the existing traffic with the certificated carriers. Although some of the latter carriers would suffer a loss of traffic, the shippers would gain more frequent service or at least a greater amount of cargo space for which they have shown there is a need during the period August through February."

As these constitutive findings make plain, the Commission's problem was to find a means of supplying additional *eastbound* cargo space without overloading the already over-supplied *westbound* trade. No existing intercoastal carrier could be induced to put on more eastbound tonnage because of inability to obtain profitable return loads.

Under these circumstances, the proposed Isbrandtsen service, eastbound only as a leg of a round-the-world route, supplied the prefect solution to the Commission's dilemma.

Accordingly, the Commission made the ultimate finding "that the present and future public convenience and necessity require operation by the applicant as a common carrier by water" (285 I. C. C. at 379). To tailor the certificate to the need demonstrated on the record, the Commission granted, in principal part, (1) a general intercoastal certificate restricted to the months of August through February and (2) an unrestricted certificate to serve the ports of New Haven, Connecticut and Port Richmond and Port Hueneme, California (*Ibid.*).

The initial report and order of the Commission was rendered by Division 4 of the Commission on September 10, 1953. On petition for reconsideration, the full Commission affirmed the report and order of Division 4. Thereafter, Luckenbach instituted this action in the District Court for the Southern District of New York to enjoin and set aside both the initial order of Division 4 and the order denying the petition for reconsideration. Because the Commission's order was to go into effect December 28, 1953, a restraining order was granted by Judge Kaufman on December 21, 1953, pending a hearing and determination of the action by a three-judge court. After hearing was had and briefs were filed, that Court, on January 29, 1954, denied the request for an injunction and dismissed the complaint.

V. The Opinion Below

The opinion of the lower court is not yet reported. In the Court below, as in this Court, Luckenbach conceded that there was adequate basis in the record to support the ultimate findings made by the Commission (1) that there was a public need for the service and (2) that Isbrandtsen was fit, willing and able to respond to that need. Below, as here, petitioner challenged the validity of the Commission's order on the sole ground that the Commission failed to give

proper consideration to certain allegedly material issues tendered by petitioner (Statement, Appendix A, p. 26).

In essence, the Court below found that the record amply supported the Commission's decision and that the Commission had given adequate consideration to every issue material to its determination which had been properly tendered to it. Speaking through Hand, J., the Court decided that the essential basis of the Commission's order sufficiently appeared in the report so that the Court could satisfy itself that the Commission had performed its function. Having so found, the Court adhered to the principle so often expressed by this Court that "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Line* v. *United States,* 292 U. S. 282, 286-287.

Noting that Section 14(1) of the Interstate Commerce Act, 49 U. S. C. 14(1), does not require the Commission to make detailed findings of fact except in a case where damages are involved, the Court held that Section 8(b) of the Administrative Procedure Act did not require the Commission "to discuss each consideration expressed in the National Transportation Policy regardless of its materiality to the decision it renders" (Statement, Appendix A, p. 27). Judge Hand relied upon *Alabama Great Southern R. Co.* v. *United States,* 340 U. S. 216, 288, for the proposition that "the basic findings essential to the validity of a given order will vary with the statutory authority invoked and the context of the situation presented", and he found that the Commission's decision reflected a rational treatment of every issue material to its decision. He said "it was for the Commission to decide whether the granting of the certificate in such a case is in the public interest" (*Id.,* pp. 27, 29).

VI. Argument

As we show hereinafter, the record on its face discloses that the Commission considered and resolved in its report every issue material to the proceeding before it. The case presents no substantial question concerning either construction of the Interstate Commerce Act or the meaning of Section 8(b) of the Administrative Procedure Act. There is no conflict in the decisions of lower courts which this Court must reconcile.

Appellant maintains that the Commission failed to make findings concerning (1) the impact upon national defense of a grant to Isbrandtsen; (2) the effect of Isbrandtsen competition upon existing carriers; (3) possible unfair competition arising from the fact that the Isbrandtsen Company also engaged in foreign trade. In addition, the Commission's decision in this case is challenged as allegedly inconsistent with a preliminary decision by the Commission in another case. The Court below correctly found that (1) the Commission was not required to make a finding as to national defense on this record; (2) that there was in fact no inconsistency in the decisions of the Commission; and (3) that fully adequate findings were made on the other issues.

The decision below was clearly correct and should be affirmed by this Court without further proceedings.

1. *The "National Defense" factor was not a material issue before the Commission.*

There is no reason to disturb the Commission's decision because of its omission to refer expressly to Appellant's belated attempt to inject an issue concerning the national defense. The lower Court correctly ruled that "the record here discloses that the issue of national defense was not raised below" (Statement, Appendix A, p. 28). During the

hearing, Appellant presented no evidence whatever on this subject. Nor did it seek rehearing or a further hearing to present such evidence, as permitted by Rule 101 (b) of the Rules of Practice of the Interstate Commerce Commission, 49 C. F. R., Ch. 1, § 1.101(b).[1] Appellant grounds this phase of its appeal exclusively upon a belated reference to the subject by way of its "Petition for Reconsideration" before the Agency (Statement, Appendix B, p. 31). The insubstantiality of the claim that a "material issue" requiring explicit discussion was thereby raised is apparent from a glance at the pertinent rule of the Commission, entitled "Reconsideration". Rule 101(d), 49 C. F. R., Ch. 1, § 1.101(d). That rule reads:

> "*Reconsideration.* If relief under this section other than under paragraphs (b) [i.e., "Rehearing or further hearing] and (c) [i.e., Modification of effective date] is sought, *the matters claimed to have been erroneously* decided and the alleged errors or relief sought must be specified. . . " (emphasis supplied).

The context of this rule makes plain that it contemplates and requires reference to issues already raised and adjudicated in the previous administrative proceedings. In this case Appellant had failed to present any evidence on the national defense matter in the original hearing and had not even requested a further hearing for that purpose under Rule 101(b) Note 1 *supra*. Consequently, there was nothing for the Commission to *reconsider* concerning that matter. In this procedural setting, the appeal on the national defense ground is controlled by *United States* v. *L. A. Tucker*

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[1] Rule 101(b) reads as follows:

"(b) ***Rehearing or further hearing.*** When in a petition filed under this section opportunity is sought to introduce evidence, the evidence to be adduced must be stated briefly, such evidence must not appear to be cumulative, and explanation must be given why such evidence was not previously adduced."

Truck Lines, 344 U. S. 33, where this Court said (344 U. S. at 36, 37):

> " . . . The issue is *clearly an afterthought* brought forward at the last possible moment to undo the administrative proceedings . . .
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> * * * * *
>
> " . . . Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against *objection made at the time appropriate under its practice*" (emphasis supplied).

The record shows, moreover, that on the merits there is no substance in the claim that the national defense factor was a material issue in this case and that the Commission's findings were insufficient to dispose of the matter even as belatedly injected by Appellant in its "Petition for Reconsideration". Appellant's claim concerning the alleged disregard of the national defense in certificating Appellee for eastbound intercoastal service was as follows (Statement, Appendix C, p. 46):

> "The utilization by Isbrandtsen of domestic operating rights as a segment of a long-haul foreign-trade operation eliminates one of the basic defense objectives of the intercoastal trade—namely, to maintain in home waters sufficient available tonnage in the event of an emergency. To *substitute* for vessels devoted to intercoastal trade, vessels which are operating as only a segment of a long-haul operation would be a radical departure from the basic defense objectives of the National Transportation Policy" (emphasis supplied).

That the claim is immaterial here is plain from the fact that certification of Appellee for eastbound service did

not "substitute" Appellee's vessels for any others. This case does not concern a situation in which Appellant is offering to perform the same service as Appellee proposed, but with additional vessels which will engage solely in intercoastal trade. Nor did Appellant's Petition for Reconsideration suggest that the effect of the decision would be to force a reduction in the number of its vessels engaged in intercoastal service. If anything, the effect of the certification of Appellee was to provide for the availability of *additional* tonnage in home waters at the times when Appellee's vessels were servicing the intercoastal trade. Thus, the facts here revealed that unless Appellee was certificated nobody would furnish the service it proposed, as was expressly recognized in the following findings of the Commission (285 I. C. C. at 378):

> "Attempts have been made by some of the protestants to add additional vessels to their intercoastal service during and since 1950. These ventures proved unsatisfactory from a revenue standpoint *and the added ships were removed from the trade.* Some of the protestants state that they are ready to increase the number of ships in this trade whenever they believe that the ships now in this service are not providing adequate cargo space. Since there appears to have been a substantial eastbound tonnage (general cargo, including lumber) available for the added ships during the period of their operation, it is apparent that the lack of westbound cargo had a material effect on the decision of the protestants to withdraw the added ships from the trade.
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> • • • • •
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> " . . . It is evident that the lack of westbound cargo was a major reason for the unprofitability of the increased service attempted by two of the protestants. Since the unbalance in eastbound and westbound volume of cargo will no doubt continue into the foreseeable

future, *any improvement in intercoastal service will have to be accomplished by service of the nature proposed by the applicant.*" (emphasis supplied).

In short, for both procedural and substantive reasons, the record on its face amply supports Judge Hand's rejection of Appellant's national defense argument. As he said (Statement, Appendix A, p. 28):

> " . . . Nor is it clear that there is any substantial interest of national defense involved or violated. The need for the proposed service was established and in the 'context of the situation presented' we do not think an affirmative discussion of national defense was necessary to validate the order."

2. *The Commission made wholly adequate findings concerning the competitive effect upon existing carriers.*

Contrary to Appellant's assertion, the Commission took express cognizance of "the present financial plight of the intercoastal trade" (Statement, p. 10). Thus, its findings included the following recital (285 I. C. C. 369, 377):

> "American-Hawaiian, Luckenbach, Pope & Talbot, and Arrow Line adduced evidence in opposition to applicant's proposed service. In support of their position they show low earnings or deficit operations for the period since World War II . . . "

And the lower Court correctly ruled that the Commission's findings amply covered the impact of the certification of Appellee upon existing carriers. In the Court's words (Statement, Appendix A, p. 28):

> "As to the detrimental effect on existing carriers, we think the Commission in its order clearly did pass on this issue. It recognized that: 'If the proposed service is authorized, applicant would necessarily have to share some of the existing traffic with the certificated carriers. Although some of the latter carriers would

suffer a loss of traffic, the shippers would gain a more frequent service or at least a greater amount of cargo space, for which they have shown there is a need during the period of August through February.' Furthermore, in restricting the proposed service to peak periods, sharply limiting the ports to be served by year round service, and limiting the products that can be carried from ports in the northwest, the Commission has shown that it gave due consideration to the position of existing certificated carriers. A decrease in revenue or sharing of existing tonnage will not of itself defeat an application. Where, as here, it is shown that the proposed service will serve the needs of the public, and the transportation system, then the application may be granted."

What the Commission did was to weigh the needs of the shippers against the revenue requirements of the existing carriers, as it is required to do by the statute. The National Transportation Policy is not limited to encouraging "sound economic conditions among the several carriers", but declares as its ultimate objective the development of a "national transportation system . . . adequate to meet the needs of the commerce of the United States." The Commission must of necessity balance the needs of shippers for service against the revenue requirements of carriers whenever it is faced, as here, with an application for certification opposed by existing carriers. That is what it did here and, in the light of the evidence before it, the decision to issue the certificate is unassailable. In such circumstances its adjudication clearly had the requisite "rational basis" precluding judicial interference. As the lower Court recognized (Statement, Appendix A, p. 29): "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286-287.

The real complaint of Appellant is not that the Commis-

sion's decision ignored the standards of the National Transportation Policy, but that it threatened to prevent Appellant from acquiring a vested interest in the existing traffic. However, Appellant is clearly in error in assuming that "carriers initially in a field are immune against additional and competitive carriers in the face of public convenience and necessity" for additional service. *A.B.&C. Motor Co.* v. *United States,* 69 F. Supp. 166, 169 (D. C. Mass. 1946). The question of the impact of the Commissioner's order on Appellant, as an existing carrier, therefore, presents no substantial question warranting further consideration by this Court.

3. *No issue concerning rate practices in foreign trade was relevant in this certificate proceeding.*

The contention that a material issue concerning unfair competition was neglected is transparently superficial. According to Appellant, the Examiner improperly excluded evidence of Isbrandtsen's rate practices in foreign trade which might have had some material bearing on Isbrandtsen's future intercoastal rate practices (Statement, pp. 2, 6). But foreign trade rate practices are not relevant in an intercoastal certificate proceeding for the simple reason that the Interstate Commerce Act provides a complete but separate regulatory scheme for the control of all aspects of intercoastal rate making. (Sections 305-307, 49 U. S. C. §§ 905, 907).

Under the Act, intercoastal carriers must file their rate schedules with the Commission 30 days prior to their effective date. Appellant may then lodge a timely complaint with the Commission. *Coyle Line, Inc.* v. *United States,* 115 F. Supp. 272, 278 (D. C. E. D. La., 1953). In other words, the Commission is fully empowered to prevent rebates and other unfair competitive practices in intercoastal trade.

That the Commission was well aware of the distinction between unregulated foreign rate practices and regulated intercoastal rate practices is clearly reflected by its decision. As Judge Hand observed (Statement, Appendix A, p. 29):

> "The charge of unfair competition also seems clearly to have been considered by the Commission. * * * Thus, it is clear that the Commission weighed the need for the services against the possibility of unfair competition and found that with the limitations of the certificate and the close regulation which accompanies the receipt of such approval, the public convenience and necessity would be served by permitting the proposed service. This has been done before. * * * Moreover the record here shows that there are other carriers in the intercoastal trade who are at present engaged in foreign trade. There is no evidence to show that this has resulted in unfair competitive practices."

4. *No substantial question is presented by the asserted inconsistency between the administrative decisions in this case and the WCTO* case.

The opinion below demolishes Appellant's elaborate effort to build an issue for this Court on the claim that that Commission inexplicably reached different results in this case and the companion case of *West Coast Trans-Oceanic Steamship Line,* 285 I. C. C. 381 (Statement, pp. 20-22). As Judge Hand observed, the vital distinction was that Appellee here sought and was in a position profitably to service only the under-tonnaged *eastbound* service, whereas WCTO applied for and was dependent upon entry into the oversupplied *westbound* trade as well. In the words of the Court (Appendix A, p. 30):

> "The plaintiff's final claim is that the findings of the Commission are arbitrary and capricious because they are inconsistent with those made in West Coast Trans-Oceanic Steamship Line Common Carrier Application,

Docket No. W-1019 (September 9, 1953). An attempt is made to prove this by extracting phrases from that order and attaching undue significance to them, but a report of the Commission must be read as a whole. Newtex S. S. Corp. v. United States, *supra.* West Coast applied for a certificate for intercoastal traffic generally, but the Commission, finding no need for additional westbound tonnage, denied the application because it was not shown that West Coast could operate profitably in eastbound trade alone. In the words of the Commission: 'we are convinced that without authority to operate its ships in westbound service, any attempt to perform eastbound service only would prove unsuccessful and should be denied.' The position of Isbrandtsen is clearly distinguishable in view of its proposal to use its ships now in round the world trade to carry on the eastbound service."

Apart from the fact that the results are entirely consistent, Appellant could not complain even if they were irreconcilable. As Mr. Justice Brandeis stated in *Virginia Railroad Co.* v. *United States,* 727 U. S. 658, 666:

> "This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, *or with the alleged inconsistency of the findings made in other proceedings before it.*" (Emphasis supplied.)

Conclusion

Appellant's Statement conceded, at p. 2):

> "The report of the Interstate Commerce Commission appears reasonable and intelligible on its face. It is not Luckenbach's position that the Commission failed to make findings of fact or that it failed to give rational reasons for its action."

And, as shown above, the Commission's report treats and disposes of every issue material to the proceeding. It fol-

lows that the decision of the Court below should be affirmed without further proceedings.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 685

LUCKENBACH STEAMSHIP COMPANY, INC., *Appellant*,

v.

UNITED STATES OF AMERICA ET AL., *Appellees*.

BRIEF OF LUCKENBACH STEAMSHIP COMPANY, INC., OPPOSING MOTIONS TO AFFIRM

A joint motion to affirm was filed by the United States and the Interstate Commerce Commission ("Commission"), and separate motions were filed by Isbrandtsen Co., Inc. ("Isbrandtsen"), and the New Haven Chamber of Commerce. Parr-Richmond Terminal Co. joined in Isbrandtsen's motion. This brief, opposing the motions to affirm, is filed by appellant, Luckenbach Steamship Company, Inc. ("Luckenbach"), pursuant to Rule 7, paragraph 3, of the Rules of the Supreme Court.

I

PRELIMINARY

The motions to affirm, like the opinion below and the report of the Commission, persist in ignoring the critical issues presented by Luckenbach. With respect to the sub-

stantiality of the questions presented on this appeal, the motions do not question the existence of a conflict among the three-judge district courts on whether the Commission must make appropriate findings and affirmatively disclose its reasoning on issues raised under the relevant factors of the National Transportation Policy.[1] Nor is it denied that the Supreme Court has never passed upon the question, important in administrative practice, whether section 8(b) of the Administrative Procedure Act ("APA")[2] means what it says in requiring an agency to give its "reasons or basis" for resolving the material issues presented on the administrative record. These are questions of substantial public importance and deserve plenary consideration by this Court. Indeed, in view of the material issues raised under the National Transportation Policy which were never mentioned in its report, the Commission will inevitably treat affirmance as a holding by the Supreme Court that Commission decisions need not mention, let alone resolve, issues raised under the relevant factors of the National Transportation Policy, and as a direct repudiation of *Cantlay & Tanzola* v. *United States*, 115 F. Supp. 72 (1953) and *Clarke* v. *United States*, 101 F. Supp. 587 (1951).

As indicated in our Statement as to Jurisdiction, the district court recognized the materiality of the issues raised by Luckenbach before the Commission. That court disposed of the case on whether the Commission's report complied with the findings-and-reasons requirement of section 8(b) of the APA. The motions to affirm take a different view. They argue that the issues raised by Luckenbach before the Commission were not "material" and reasons are therefore not required by section 8(b). Since the court below had clearly recognized the materiality of the administrative issues, we touched upon materiality in our Statement merely to indicate that in their decided

[1] 54 Stat. 899.

[2] 5 U.S.C. § 1007(b).

cases the Commission itself and the courts generally regard those issues as material and even controlling (Luckenbach, Statement pp. 17-20).

This brief opposing the motions to affirm is confined, therefore, to establishing that the issues presented to the Commission by Luckenbach are material as applied to the facts of record in this case, and that the appeal thus presents for determination the important and ripe question—upon which the lower courts are now divided—of whether section 8(b) will be enforced according to its terms and purpose.

It will be recalled that in our Statement as to Jurisdiction (which contains the basic considerations of substantiality on this appeal, not repeated herein), we said that three affirmative issues were raised by Luckenbach before the Commission, all directed at whether *shipper* need—to which the Commission limited its report—coincides with the ultimate *public* need for the proposed intercoastal service. Transportation is now so highly integrated that loss of business in one segment of a carrier's service may interfere with its ability to render service over-all, and consequently shipper need is rarely identical with the over-all requirements of transportation policy. Specifically, the three administrative issues bearing on public convenience and necessity were whether the proposed service would (1) foster unfair competitive practices, (2) impair or endanger existing carriers, contrary to the public interest, or (3) contravene the statute's policy to preserve an exclusively intercoastal water service adequate to meet the needs of the national defense for ships readily available in domestic waters, in case of emergency.

In this brief we show how each of these three issues, as applied to the relevant facts on the administrative record in this case, is material.

II

THE ISSUES RAISED BY LUCKENBACH BEFORE THE COMMISSION WERE "MATERIAL" ISSUES WITHIN SECTION 8(b) OF THE APA.

A. Unfair competitive practices.

The threat of unfair competition is not just a technical ground for denial of the Isbrandtsen certificate; it is also the practical reason for Luckenbach's vigorous opposition to certification of Isbrandtsen. Because the same ships, the same service, the same traffic solicitors, and to a substantial extent the same shippers are involved in both Isbrandtsen's unregulated foreign trade and its intercoastal operation, it would be natural for Isbrandtsen to give a large intercoastal shipper more favorable or preferential terms (lower rates or special services) in his unregulated foreign-trade shipments, in order to obtain that shipper's intercoastal cargo at prevailing intercoastal tariff rates, thereby completely foreclosing other intercoastal carriers from competing for that cargo. This leverage constitutes an unfair competitive practice, and the opportunity to engage in it requires denial of a certificate application (see cases cited in Luckenbach's Statement, p. 19).

Indeed on the record made before the Commission in this case, the Scott Paper Company, a large shipper of paper pulp in the intercoastal trade, testified that it shipped a full shipload of pulp each month via Isbrandtsen's vessels from Nova Scotia to Atlantic ports, and that the rates for that monthly shipload were privately negotiated over the table; were not subject to any regulation; were not filed with any Government agency nor even publicly disclosed (Record before the Commission, Witness Dalm, pp. 362-5). Despite this concrete illustration in the record before it of the possibilities of unfair competition, demonstrating the materiality of the issue, the Commission failed even to refer to that issue, and certainly did not give its reasons for disposing of it.

Isbrandtsen argues[3] that because the Commission has complete power to regulate intercoastal freight rates the question of unfair competition is immaterial in a certificate case. The argument is unsound. That the Commission has power to regulate intercoastal rates does not make the question of unfair competitive practices irrelevant where the proposed service will operate across and beyond the borders of the Commission's jurisdiction.[4] Even if the Commission has statutory power to regulate the described practices, it must be remembered that most of Isbrandtsen's foreign trade rates are unfiled, unreported and not even published. Thus, the task of policing those practices is beyond the investigatory capacity of the Commission's staff, and certainly beyond the reach of Isbrandtsen's intercoastal competitors.

The United States and the Commission argue[5] that it was because of Isbrandtsen's unique around-the-world service that the application was granted, and that therefore the Commission must have considered the threat of unfair competition from unregulated foreign trade. It may be that the Commission "considered" this problem, but nothing in its report suggests that the issue was raised before the Commission; certainly no reasons for disposing of it appear in the report.

B. Injury to existing carriers.

In its leading case on the subject, the Commission has held that certification of a new carrier requires a finding that the new operation can be instituted "without endangering or impairing the operations of existing carriers con-

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[3] Motion to Affirm, p. 14.

[4] As indicated in our Statement as to Jurisdiction, p. 19, the Commission has denied applications in both motor-carrier and water-carrier cases on the sole ground that a mingling of regulated and unregulated operations creates the possibility of unfair competition. We believe therefore that there can be no question but that the issue is substantial.

[5] Motion to Affirm, pp. 5-6.

trary to the public interest" *Pan-American Bus Lines Operations*, 1 M.C.C. 190, 203. This holding has been followed in numerous cases before the Commission.[6] Indeed a statutory district court, in *Clarke* v. *United States*, 101 F. Supp. 587, 593 (U.S.D.C. D.C. 1951), reversed the Commission because it had not made a finding that there would be "no adverse effects upon Atwood [the existing carrier] should the application be granted to Greyhound."

The Commission in the instant case however, far from making a finding that there would be no adverse effects upon the existing services, actually found that there would be a dilution of existing traffic. Thus, the report states:

> "It is evident that the proposed service will not increase to any appreciable extent the volume of traffic moving in intercoastal service. If the proposed service is authorized, *applicant would necessarily have to share some of the existing traffic with the certificated carriers.*" *Isbrandtsen Co., Inc., Common Carrier Application*, 285 I.C.C. 369, 378. (Emphasis added)

The Commission nevertheless failed to consider the effect of this loss of traffic on the operations of the certificated carriers to ascertain whether it would endanger or impair their services, contrary to public convenience and necessity. Without here asserting that the Commission cannot under any circumstances grant a certificate if it finds injury to existing carriers, we do claim that under section 8(b) of the APA the Commission is bound to state in its written report the "reasons or basis" for certificating a new carrier, after having first expressly found that that new carrier would take its prospective cargo from the existing carriers, who are able to carry it and desperately need to retain it.

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[6] Chief Refrigerator Truck Lines, Inc., Extension, 34 M.C.C. 492, 495; Tri-State Transit Co. of La., Extension, 29 M.C.C. 381, 401; Missouri Pacific Transportation Co., 9 M.C.C. 712, 713; Minneapolis Van & Warehouse Company, 6 M.C.C. 477, 480; Parkhill Extension, 46 M.C.C. 403, 437.

Furthermore, in *West Coast Trans-Oceanic SS Line Com. Car. Application*, 285 I.C.C. 380, 399-400, decided one day earlier by the same division of the Commission that decided this case, the Commission held:

> "One of the determinations that *must be made* in deciding whether public convenience and necessity require applicant's proposed service is whether the proposed service can be instituted without endangering or impairing the operations of existing carriers contrary to the public interest and the National Transportation Policy." (Emphasis added)

Despite this holding in the *West Coast* case, the Commission did not make that required determination in the present case. This is the more remarkable since the evidence as to the financial condition of the competing intercoastal carriers in the *West Coast* case was by stipulation of the parties incorporated into the *Isbrandtsen* case (Record before the Interstate Commerce Commission, p. 1167-8). Thus despite identical evidence in two similar contemporaneous cases, the Commission did not see fit to explain how the issue of impairment of existing operations constituted an essential and material element in one case and could be studiedly ignored in the other.

It is no answer that in the *West Coast Trans-Oceanic* case the Commission was talking about dilution of cargo in the westbound intercoastal trade, whereas in the *Isbrandtsen* case the Commission was considering eastbound service only. Manifestly, if the financial condition of existing intercoastal carriers *operating both eastbound and westbound* is precarious, and a dilution of traffic westbound would endanger or impair their operations, it follows that a dilution of cargo eastbound—which was expressly found by the Commission in this case—would likewise impair or endanger their operations. At least so likely is it that this would occur, that the Commission cannot ignore the issue in the present case, when the APA requires it to state its "reasons or basis" for decision.

C. The national defense factor.

It has been argued by the United States and the Commission,[7] and by Isbrandtsen,[8] that since the Commission was certificating an additional intercoastal carrier the importance to the national defense of Luckenbach's exclusively intercoastal service was not a material factor. This contention assumes that Isbrandtsen's around-the-world ships will not displace Luckenbach's exclusively intercoastal ships. However, since the Commission found that Isbrandtsen would necessarily share some traffic with the existing carriers, there is a distinct possibility that Isbrandtsen ships may displace Luckenbach ships exclusively employed in intercoastal service.

That this possibility alone raises a material issue involving national defense considerations is demonstrated in *Cantlay & Tanzola* v. *United States*, 115 F. Supp. 72 (1953) which, despite the arguments of the United States and the Commission, is apposite. A reduction of 40 percent in the rail rates on petroleum (there under review) would not of a certainty have displaced motor-carrier competition. Indeed, elimination of motor competition was one of the conjectural factors in that case, and one on which the Commission itself was divided, *Petroleum from Los Angeles and El Paso to Ariz. and N. Mex.*, 287 I.C.C. 731, reversed *sub. nom. Cantlay & Tanzola* v. *United States*, 115 F. Supp. 72 (1953). The court in the *Cantlay* case held that in considering the risk that a drastic rate cut might eliminate motor competition in favor of the railroads, the Commission was bound to explain the benefits which outweigh the injury to the national defense. Upon that point it is directly relevant to this case.

It is also urged that the lower court was correct in stating that the national defense issue was not raised before

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[7] United States and Interstate Commerce Commission Motion to Affirm, pp. 7-8.

[8] Isbrandtsen Motion to Affirm, pp. 10-11.

the Commission because evidence was not introduced on the point before the trial examiner.[9] This argument is without merit. Luckenbach urged the national defense factor of the National Transportation Policy, based upon facts in the record or of which the Commission could take official notice. The particular facts upon which that issue depended were in the administrative record—namely, that Luckenbach operates an exclusively intercoastal service (Record before the Commission, Witness Sinclair W. 2551-55[10]), and that Isbrandtsen's vessels proposed to operate the eastbound intercoastal leg as a part of a long-haul around-the-world operation (Record before the Commission, Witness Crinkley R. 11-14). Moreover, the consequences of World War II in destroying intercoastal operations (Record before the Commission, Witness Sinclair W. 2556-62), the difficulties of postwar rehabilitation of the trade through War Shipping Administration general agency operations (Record before the Commission, Witness Sinclair W. 2566-7, 2587-8, 2595-6), the enormous contribution of the existing certificated carriers to the postwar reestablishment of the trade, amounting to over $11,000,000 (Record before the Commission, Witness Sinclair W. 2559) —Luckenbach's losses alone, in 1947-48, amounting to approximately $2,500,000 (Record before the Commission, Witness Sinclair W. 2556)—were all in the record. Furthermore, the effect of the Korean emergency in disrupting intercoastal operations was testified to upon the record (Record before the Commission, Witness Finnesey W. 2735-41, W. 2870, R. 1093), and was found as a fact by the

[9] Isbrandtsen Motion to Affirm, pp. 8-9; United States and Interstate Commerce Commission Motion to Affirm, p. 7.

[10] Page references prefixed by W rather than R refer to portions of the transcript of record before the Interstate Commerce Commission in the West Coast Trans-Oceanic case which were incorporated in the Isbrandtsen case by stipulation of the parties. That stipulation appears in the record before the Interstate Commerce Commission at pages 1167-8.

Commission *Isbrandtsen Co. Inc., Com. Car. Application,* 285 I.C.C. 369, 376.

The question of national defense policy and military reliance upon domestic shipping in an emergency was the very question committed to the Commission for determination on the basis of officially noticed facts and informal consultation with Government agencies directly responsible for defense aspects of maritime policy, *Cantlay & Tanzola* v. *United States,* 115 F. Supp. 72, 81 (1953). It is thus inaccurate to state that there was no evidence on the defense point in the record.

The national defense argument was thus a vital and pressing question for the Commission to determine in evaluating the public convenience and necessity; the Commission and court cases (Luckenbach Statement, p. 20) proclaim its materiality; and a statement of the Commission's reasons was required before the issue could be administratively disposed of, by mandate of section 8(b) of the Administrative Procedure Act.

III

CONCLUSION

Our quarrel with the Commission is that it decided to certificate Isbrandtsen without mentioning our arguments, let alone giving its reasons for disposing of them. And the Commission did this despite the fact that section 8(b) of the Administrative Procedure Act explicitly requires an agency to give a statement of its "reasons or basis . . . upon all the material issues of fact, law, or discretion presented on the record." The court below recognized that the issues were material, but determined that the Commission complied with the requirements of section 8(b). The motions to affirm apparently agree that the Commission's report in this case does not sufficiently fulfill the reasons requirement of section 8(b), since they principally argue that the issues were not

material and thus the statute did not require reasons. We submit that the district court is correct to the extent that it recognized the clear materiality of the issues presented on the administrative record.

While it has been argued that there *are* reasons for adversely disposing of the issues, it is not and could not be seriously urged that the Commission disclosed its reasons in the report it rendered. The statute does not relegate us to our opponent's explanation of why he prevailed, and if the Commission were required to articulate its reasons we believe it would, in the course of that process, change its mind. In this connection it is important to remember that the full Commission decided this case by a divided vote of seven to four, and an expression of its reasons might readily have caused two Commissioners to change their minds.

For the foregoing reasons the motions to affirm should be denied and this case set down for plenary consideration by the Court.

Respectfully submitted,

ODELL KOMINERS,
HENRY G. FISCHER,
MARK P. SCHLEFER,
Counsel for Appellant.

April 27, 1954

No. 685. LUCKENBACH STEAMSHIP CO., INC. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Southern District of New York. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Roscoe H. Hupper, Odell Kominers, Henry G. Fischer* and *Mark P. Schlefer* for appellant. *Solicitor General Sobeloff* and *Edward M. Reidy* for the United States and the Interstate Commerce Commission; *John J. O'Connor, William L. McGovern* and *Norman Diamond* for the Isbrandtsen Co., Inc.; *Robert L. Wright* for the New Haven Chamber of Commerce; and *E. Curtis Rouse* for the Richmond Terminal Co., appellees. Reported below: —— F. Supp. ——.